UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

UNITED STATES DEPARTMENT OF AGRICULTURE

(Including Court Decisions)

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PREFATORY NOTE

Agriculture Decisions is an official publication designed to facilitate access to decisions and orders issued by the Secretary of Agriculture, or officers authorized to act in his stead, in matters arising under laws administered by the Department of Agriculture.

The published decisions principally consist of those issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the Federal Register and, therefore, they are not included in Agriculture Decisions.

Consent Decisions entered subsequent to December 31, 1986 are no longer published. However, a list of these decisions is included (53 F.R. 6999, March 4, 1988.) The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Decisions are published in order of their issuance or finality under the principal statutes administered by the Department, which are the Agricultural Marketing Act of 1946 (7 U.S.C. § 1621 *et seq.)*, the Agricultural Marketing Agreement Act of 1937 (U.S.C. § 601 *et seq.)*, Animal Quarantine and Related Laws (21 U.S.C. § 111 *et seq.)*, the Animal Welfare Act (7 U.S.C. § 2131 *et seq.)*, the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.)*, the Grain Standards Act (7 U.S.C. § 1821 *et seq.)*, the Horse Protection Act (15 U.S.C. § 1821 *et seq.)*, the Packers and Stockyards Act, 1921 (7 U.S.C. § 181 *et seq.)*, the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. § 499a *et seq.)*, the Plant Quarantine Act (7 U.S.C. § 151 *et seq.)*, the Poultry Products Inspection Act (21 U.S.C. § 451 *et seq.)*, and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. §151 *et seq.)*.

The published decisions may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision number. Prior to 1942 decisions were identified by docket and decision numbers, e.g., D-578; S. 1150 and the use of such references generally indicates that the decision has not been published in Agriculture Decisions.

LIST OF DECISIONS REPORTED

AUGUST 1988

PAGE

AGRICULTURAL MARKETING AGREEMENT ACT

WILEMAN BROS. and ELLIOTT, INC., and KASH, INC.
AMA Docket Nos. F&V 916-3 and 917-4.
ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER DENYING INTERIM RELIEF 1263

ANIMAL WELFARE ACT

ERVIN STEBANE.
AWA Docket No. 410.
DECISION AND ORDER 1264

ZOOLOGICAL CONSORTIUM OF MARYLAND, INC., and RICHARD HAHN.
AWA Docket No. 401.
DECISION AND ORDER 1276

PACKERS AND STOCKYARDS ACT

Disciplinary Decisions:

COVINGTON SALE COMPANY, INC.
P&S Docket No. D 88-82.
ORDER DISMISSING COMPLAINT 1289

C. LeROY NOLL.
P&S Docket No. 6711.
ORDER DISMISSING APPEAL 1289

JAMES E. OLESEN.
P&S Docket No. 6909.
SUPPLEMENTAL ORDER 1290

PAGE

PACKERS AND STOCKYARDS ACT (Cont.)

Disciplinary Decisions (Cont.):

SARCOXIE COMMUNITY SALES, INC.
P&S Docket No. 6762.
DECISION AND ORDER 1290

WESTERN STATES CATTLE COMPANY,
TOM M. CROWL, GARY D.
DeHAAN, and MERRITT BROWN.
P&S Docket No. 6592.
AMENDED STAY ORDER 1304

ROBERT W. BUTTERFIELD, and
BARTONS LAND & LIVESTOCK,
INC. v. GENE GLIGOREA.
P&S Docket No. 6859.
ORDER OF DISMISSAL 1305

Reparation Decisions:

MARSHALL LIVESTOCK AUCTION, INC.
v. ROBERT F. JOHNSON.
P&S Docket No. R 88-13.
DECISION AND ORDER 1310

CHARLES SHOEMAKER, WELLS RANCH,
INC., and LESTER WELLS v.
ERICSON LIVESTOCK MARKET,
INC., and RONALD E. WILSON.
P&S Docket No. 6931.
STAY OF PROCEEDINGS AGAINST
RONALD E. WILSON 1312

PAGE

PERISHABLE AGRICULTURAL COMMODITIES ACT

Court Decisions:

RICHARD E. LYNG, Plaintiff v.
A. PELLEGRINO & SONS,
INC., et al., Defendants.
Civ. A. No. 86-1534-C.
U.S. DISTRICT COURT, D.
MASSACHUSETTS 1313

MARVIN PROPERTIES, INC. dba
CUT & READY FOODS,
Debtor. CONSOLIDATED
MARKETING, INC., Appellant v.
MARVIN PROPERTIES, INC., dba
CUT & READY FOODS; BANK OF
CALIFORNIA, Appellees.
No. 87-2488.
UNITED STATES COURT OF
APPEALS NINTH CIRCUIT 1314

Disciplinary Decisions:

McALLEN PRODUCE COMPANY,
a/t/a McALLEN PRODUCE
COMPANY, INC.
PACA Docket No. D 88-508.
DECISION AND ORDER 1319

Reparation Decisions:

AMCLO INTERNATIONAL MARKETING
82, INC. v. DENNIS
PRODUCE SALES, INC.
PACA Docket No. 2-7401.
DECISION AND ORDER 1321

ANTIGO POTATO BROKERAGE
EXCHANGE v. BUSHMAN'S, INC.
PACA Docket No. 2-7258.
DECISION AND ORDER 1321

Reparation Decisions (Cont.)

ATLANTIC FRUIT COMPANY v.
RALPH & CONO
COMUNALE PRODUCE CORP.
PACA Docket No. 2-7478.
DECISION AND ORDER 1322

JACK T. BAILLEE CO., INC. v. PAMCO
AIRFRESH, INC., and/or
VISTA McALLEN, INC.
PACA Docket No. 2-7277.
DECISION AND ORDER 1322

BUJULIAN BROS. PACKING, INC. v.
MINNESOTA PRODUCE, INC.
PACA Docket No. 2-7494, and
MINNESOTA PRODUCE, INC. v.
COUNTRY CLUB MARKET, INC.
PACA Docket No. 2-7532.
DECISION AND ORDER 1323

CAL/MEX DISTRIBUTORS, INC. v.
WOLVERINE FRUIT CO.
PACA Docket No. 2-7423.
DECISION AND ORDER 1323

CALIFORNIA ARTICHOKE and VEGETABLE
GROWERS CORPORATION v.
LOWELL J. SCHY d/b/a LOWELL
SCHY BROKERAGE.
PACA Docket No. 2-7177.
DECISION AND ORDER 1324

CALIFORNIA SPROUT & CELERY CO.,
INC. v. SCHAUMBURG PRODUCE, INC.
PACA Docket No. 2-7249.
DECISION AND ORDER 1327

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Decisions (Cont.):

CLUB CHEF, INC. v. S&K FARMS, INC.
PACA Docket No. R 88-93.
ORDER OF DISMISSAL 1328

ERNIE DALIDIO d/b/a ZAPATA SALES v.
VIC MAHNS, INC.
PACA Docket No. 2-7416.
DECISION AND ORDER 1328

FLORIZA SALES CO., INC. v.
PAMCO AIR FRESH, INC.
PACA Docket No. 2-7187.
DECISION AND ORDER 1328

4-STAR TOMATO, INC. v. W.W. ROGERS
& SONS PRODUCE, INC.
PACA Docket No. 2-7406.
DECISION AND ORDER 1342

GEORGIA VEGETABLE CO. v.
GERONIMO'S, INC.
PACA Docket No. R 88-218.
ORDER REQUIRING PAYMENT OF
UNDISPUTED AMOUNT 1342

EDWARD H. GRAFF, JR. v.
CHARLES OCHS.
PACA Docket No. 2-7506.
DECISION AND ORDER 1343

HYLAND LAKES BRAND, INC. v.
BUSHMAN'S, INC.
PACA Docket No. 2-7272.
DECISION AND ORDER 1343

KROME AVENUE BEAN GROWERS, INC.
d/b/a KROME AVENUE SALES v.
GENERAL PRODUCE, INC.
PACA Docket No. 2-7428.
DECISION AND ORDER 1344

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Decisions (Cont.):

LANDMARK PRODUCE SALES v.
HUDIS PRODUCE CO.
PACA Docket No. R 88-77.
ORDER REQUIRING PAYMENT
OF UNDISPUTED AMOUNT 1344

MARTORI BROS. DIST. v. C.H.
ROBINSON COMPANY.
PACA Docket No. R 88-101.
ORDER OF DISMISSAL 1345

MERIT PACKING COMPANY v.
PAMCO AIRFRESH, INC.
PACA Docket No. 2-7276.
DECISION AND ORDER 1345

ROBERT L. MEYER d/b/a MEYER
TOMATOES v. SANTOS
PRODUCE CO., INC.
PACA Docket No. R 88-180.
ORDER OF DISMISSAL 1348

MICHAEL W. MORGAN & JOHN C.
VEYSEY, d/b/a RANCHO
DOS PALMAS v. BOISE
FARMERS MARKET, INC.
PACA Docket No. 2-7255.
DECISION AND ORDER 1349

MIDWEST MARKETING COMPANY v.
SANFILLIPO BROS., INC.
PACA Docket No. 2-7562.
DECISION AND ORDER 1349

JAY NICHOLS, INC. v.
CAPITOL PRODUCE, INC.
PACA Docket No. 2-7144.
DECISION AND ORDER 1350

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Decisions (Cont.):

NIKADEMOS DISTRIBUTING COMPANY, INC. v. BOLIVAR GAMEZ d/b/a ROBIL INTERNATIONAL.
PACA Docket No. 2-7295.
DECISION AND ORDER 1350

NORTHCROSS DISTRIBUTING v. EAST COAST BROKERS & PACKERS, INC.
PACA Docket No. 2-7335.
DECISION AND ORDER 1351

P-R FARMS SALES & EXPORT, INC. v. TOM LANGE COMPANY, INC.
PACA Docket No. 2-7420.
DECISION AND ORDER 1351

GRADY PRUETTE, d/b/a C&G PACKERS v. MELBURN R. TROVER, d/b/a TROVER PRODUCE.
PACA Docket No. R 88-184
REPARATION ORDER 1352

JAMES C. RETRUM and LINDA C. RETRUM d/b/a J & L PRODUCE v. DAL-DON PRODUCE CO. INC.
PACA Docket No. 2-7309.
DECISION AND ORDER 1352

SAN MIGUEL PRODUCE, INC. v. SUNSPROUTS OF TEXAS, INC. and/or C.H.R. COMPANY.
PACA Docket No. 2-7250.
DECISION AND ORDER 1353

GILBERTO R. SANTOS d/b/a S & S PRODUCE v. VAN De WALLE FARMS, INC.
PACA Docket No. 2-7366.
DECISION AND ORDER 1353

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Decisions (Cont.):

SUNRISE PRODUCE, INC. v. THE
CASTELLINI COMPANY.
PACA Docket No. 2-7024.
STAY ORDER AND EXTENSION
OF TIME FOR FILING
PETITION TO REHEAR,
REARGUE, AND RECONSIDER 1354

TAVILLA SALES COMPANY v.
VAL-MEX FRUIT CO., INC.
PACA Docket No. 2-7254.
DECISION AND ORDER 1354

THE TOBI COMPANY, INC. v.
HARKNESS-COLGATE-
BARTELL, INC., a/t/a
UNITED PACKING COMPANY.
PACA Docket No. 2-7414.
ORDER(Continuance) (Not published herein)

ROBERT D. WURDEN, a/k/a
BOB WURDEN v. WINDSOR
FARMS, INC., and/or MID-
AMERICA POTATO COMPANY.
PACA Docket No. 2-7158.
STAY ORDER (Not published herein)

Reparation Default Orders:

JAMES S. AGAR and MARK R. SEITZ
d/b/a RANCHO VISTA FARMS v.
CALIFORNIA SPROUTS and
CELERY, CO.
PACA Docket No. RD 88-281.
STAY ORDER (Not published herein)

ATB DISTRIBUTING CO. v. DAN E.
FRIESEN & CO. INC.
PACA Docket No. RD 88-372 1355

PAGE

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Default Orders (Cont.):

AMERICAN BANANA CO. INC. v.
FOODWAYS INC.
PACA Docket No. RD 88-378 1355

GUS ANGELAKIS and JOYCE
ANGELAKIS d/b/a
FRANCISCO DISTRIBUTING
COMPANY v. SMITHPRO
BROKERAGE INC.
PACA Docket No. RD 88-414 1355

HENRY ANKENY CO. v. GARY
WATKINS PRODUCE CO. INC.
PACA Docket No. RD 88-345 1355

ARKANSAS VALLEY PRODUCE
OF TEXAS INC. v.
ORIENT PRODUCE & FOOD CO.
PACA Docket No. RD 88-386 1356

ASSOCIATED POTATO GROWERS
INC. v. TOXEY G.
LANDRUM JR. d/b/a
TOXEY GERALD LANDRUM JR.
PACA Docket No. RD 88-354 1356

ROBERT L. BERARD d/b/a SPUDLAND
MARKETING v. PRODUCE
COUNTRY.
PACA Docket No. RD 88-341 1356

BIG "H" SALES, INC. v. SPADA
DISTRIBUTING CO., INC
PACA Docket No. RD 88-262.
ORDER DENYING MOTION TO
REOPEN AFTER DEFAULT,
VACATING STAY ORDER,
REINSTATING DEFAULT ORDER 1356

PAGE

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Default Orders (Cont.):

BLOCH & LODER INC. a/t/a
PACIFIC PRODUCE COMPANY
WAIALUA PRODUCTS LTD.
PACA Docket No. RD 88-368 1357

BLUE ANCHOR INC. v. BARRIE
KELLNER, KARL KELLNER & MEL
WINICK d/b/a ATLANTIC PRODUCE
and/or ATLANTIC PRODUCE INC.
a/t/a ATLANTIC PRODUCE.
PACA Docket No. RD 88-375 1357

GODFREY BORGARDT & SONS INC. v.
J.W. NASH PRODUCE CO. INC.
PACA Docket No. RD 88-390 1357

CASTIGLIONE BROS. v.
GAETANO J. RUSSO,
d/b/a GR PRODUCE CO.
PACA Docket No. RD 88-235.
STAY ORDER (Not published herein)

CHAPMAN FRUIT CO. INC. v.
VIC MAHNS INC.
PACA Docket No. RD 88-374 1358

CHAPMAN FRUIT CO. INC. v. S.W.
FLORIDA SALES CORP.
PACA Docket No. RD 88-393 1358

COLORADO POTATO GROWERS
EXCHANGE v. GARY
WATKINS PRODUCE CO. INC.
PACA Docket No. RD 88-391 1358

CRAVERO BROS. PRODUCE CO. v.
SUNCOAST FOODS INC.
PACA Docket No. RD 88-381 1358

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Default Orders (Cont.):

THOMAS DAME.
PACA Docket No. RD 88-369 1359

De BRUYN PRODUCE CO. v.
WAYCO CORP. a/t/a
AMERITEX PRODUCE.
PACA Docket No. RD 88-343 1359

NICK DELIS CO. INC. v. WESTATES
COMMODITIES INC.
PACA Docket No. RD 88-340 1359

ELL-PINE PACKING CO. v. ROBERT G.
GREIDER d/b/a GREIDERS
OLD FASHION POTATO CHIPS.
PACA Docket No. RD 88-366 1359

FINEST FRUIT INC. v. WILLIAM J.
HANLON d/b/a HOL-LEE FARMS.
PACA Docket No. RD 88-364 1360

SCOTT FINKS CO. INC. v. TOXEY G.
LANDRUM JR. d/b/a TOXEY
GERALD LANDRUM JR.
PACA Docket No. RD 88-355 1360

ANGELO M. FORMOSA FOODS INC. v.
RESTAURANT SERVICES INC.
PACA Docket No. RD 88-385 1360

FRUITS OF FOUR SEASONS INC. v.
GLENMERE FARMS INC.
PACA Docket No. RD 88-353 1360

GILL CORN FARMS INC. v. L.R.
MORRIS PRODUCE
EXCHANGE INC.
PACA Docket No. RD 88-394 1361

PAGE

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Default Orders (Cont.):

GRIFFIN & BRAND SALES AGENCY INC. v. SMITH PRODUCE INC.
PACA Docket No. RD 88-413 1361

STAN HARTMANN SALES CO. INC. v. GUSTIN PRODUCE INC.
PACA Docket No. RD 88-350 1361

L.G. HERNDON JR. d/b/a L.G. HERNDON JR. FARMS v. LARRY H. PLOTT d/b/a FARM FRESH MARKET.
PACA Docket No. RD 88-379 1361

H.R. HINDLE & CO., INC. v. CALIFORNIA CUSTOM CUTS, INC.
PACA Docket No. RD 88-200.
RULING ON RECONSIDERATION 1362

THE HORTON FRUIT CO. INC. v. DANIEL R. BOLIN d/b/a BOLIN'S PRODUCE.
PACA Docket No. RD 88-363 1362

KENNY'S PRODUCE INC. v. JOHN ORTEGA d/b/a EL RANCHO PRODUCE.
PACA Docket No. RD 88-384 1362

L & J MARKETING CO. v. JOHN M. GIUSTINO d/b/a GRAND SLAM PRODUCE.
PACA Docket No. RD 88-339 1363

L J C PRODUCE CO. INC. v. KOREAN PRODUCE CORPORATION.
PACA Docket No. RD 88-352 1363

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Default Orders (Cont.):

LAKE WALES CITRUS GROWER'S ASSOCIATION v. PRODUCE COUNTRY.
PACA Docket No. RD 88-373 1363

DONALD J. LALONDE and ARTHUR F. LALONDE JR. d/b/a CONTINENTAL SALES v. RESTAURANT SERVICES INC.
PACA Docket No. RD 88-347 1363

LANGDON BARBER GROVES INC. a/t/a M W FRUIT CO. v. MARIA-NINO'S INC. a/t/a NINO'S FARMER'S MARKET.
PACA Docket No. RD 88-383 1364

M.J. FARMS INC. v. GREAT PLAINS BROKERAGE INC.
PACA Docket No. RD 88-365 1364

MANN PACKING COMPANY INC. v. BOZZELLI FARMS INC.
PACA Docket No. RD 88-388 1364

DANIEL J. MATTHEWS d/b/a J.C. MATTHEWS CO. v. HUB CORPORATION a/t/a PICKLE KING.
PACA Docket No. RD 88-360 1364

MAUNA KEA AGRONOMICS INC. v. JOSEPH CIMINIO COMPANY INC.
PACA Docket No. RD 88-337 1365

DONALD H. MOLTER d/b/a ED'S PRODUCE v. PALM CITY PRODUCE INC.
PACA Docket No. RD 88-356 1365

PAGE

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Default Orders (Cont.):

MUIR-ROBERTS COMPANY INC. v.
SMITH PRODUCE INC.
PACA Docket No. RD 88-380 1365

MURAKAMI FARMS INC. a/t/a
MURAKAMI PRODUCE CO. v.
MATRANA'S PRODUCE INC.
PACA Docket No. RD 88-269 1365

MURAKAMI FARMS INC. a/t/a
MURAKAMI PRODUCE CO. v.
MATRANA'S PRODUCE INC.
PACA Docket No. RD 88-269.
ORDER REOPENING AFTER DEFAULT 1366
[New Docket No. R 88-231]

NEW WEST FRUIT CORPORATION v.
GUSTIN PRODUCE INC.
PACA Docket No. RD 88-349 1366

NORTH SIDE BANANA COMPANY v.
EDNA E. THOMPSON d/b/a
FORT BEND COUNTY
FARMERS MARKET.
PACA Docket No. RD 88-359 1366

NORTHAMPTON GROWERS PRODUCE
SALES INC. v. ADVANCED
SHIPPING AND TRADING a/t/a
FAIR SEAS TRADING.
PACA Docket No. RD 88-338 1366

NORTHERN PRODUCE/MUSHROOMS
INC. v. BOZZELLI FARMS INC.
PACA Docket No. RD 88-387 1367

PAGE

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Default Orders (Cont.):

J.R. NORTON COMPANY v. LOI
BRONX TERMINAL CORP.
PACA Docket No. RD 88-357 1367

PACIFIC FARM COMPANY v.
KOREAN PRODUCE
CORPORATION.
PACA Docket No. RD 88-351 1367

PACIFIC FRESH MARKETING
INC. v. DOTTIE
CHARBONEAU and
CHARLES R. SULLWOLD
d/b/a C & S PRODUCE.
PACA Docket No. RD 88-346 1367

ARK RIVER POTATO CO. INC. v.
JOE B. ALLEY d/b/a
A-1 PRODUCE COMPANY
OF JACKSON MISS.
PACA Docket No. RD 88-342 1368

PATTILLO BROS. PRODUCE CO.
INC. v. J.W. NASH
PRODUCE CO. INC.
PACA Docket No. RD 88-411 1368

PHELAN & TAYLOR PRODUCE
COMPANY v. SMITHPRO
BROKERAGE INC.
PACA Docket No. RD 88-415 1368

PRESTIGE PRODUCE & FARMS
INC. v. VIC MAHNS INC.
PACA Docket No. RD 88-395 1368

PAGE

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Default Orders (Cont.):

RITCLO PRODUCE INC. v.
BOZZELLI FARMS INC.
PACA Docket No. RD 88-389 1369

RIVER CITY PRODUCE CO. INC. v.
ALICE KIKER d/b/a
A-1 PRODUCE.
PACA Docket No. RD 88-376 1369

C.H. ROBINSON COMPANY v.
THE TOLEDO GARDENERS
COOPERATIVE ASSOCIATION.
PACA Docket No. RD 88-344 1369

C.H. ROBINSON COMPANY v.
GARY WATKINS PRODUCE
CO. INC.
PACA Docket No. RD 88-371 1369

ROCKY PRODUCE INC. v.
PETER J. TOCCO d/b/a
PREMIER PRODUCE CO.
PACA Docket No. RD 88-377 1370

JOHN ROTHSTEIN CO. INC. v.
JESUS M. PEREZ
d/b/a 666 PRODUCE.
PACA Docket No. RD 88-367 1370

RICHARD M. RUIZ d/b/a
RUIZ PRODUCE CO. v.
J.W. NASH PRODUCE
CO. INC.
PACA Docket No. RD 88-410 1370

S & S PRODUCE CO. v.
DOTTIE CHARBONEAU and
CHARLES R. SULLWOLD
d/b/a C & S PRODUCE.
PACA Docket No. RD 88-392 1370

PAGE

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Default Orders (Cont.):

SOUTHWEST PRODUCE CO. INC. v.
D & L GROCERY INC. a/t/a
RONNIES FOOD CENTER.
PACA Docket No. RD 88-382 1371

TRIPLE E PRODUCE CORP. v.
INDEPENDENCE PRODUCE
COMPANY INC.
PACA Docket No. RD 88-362 1371

UCON PRODUCE INC. v.
SMITH PRODUCE INC.
PACA Docket No. RD 88-412 1371

VAL-MEX FRUIT COMPANY INC. v.
ERNEST CAVAZOS d/b/a
ERNEST PRODUCE.
PACA Docket No. RD 88-361 1371

VENIDA PACKING INC. v.
SELECT PRODUCE INC.
PACA Docket No. RD 88-348 1372

WINTER GARDEN GROWERS INC. v.
J.W. NASH PRODUCE
CO. INC.
PACA Docket No. RD 88-282 1372

POTATO RESEARCH AND PROMOTION ACT

BUZZ SHAHAN, d/b/a
SHAHAN FARMS.
PRPA Docket No. D-4.
ORDER 1373

PAGE

CONSENT DECISIONS

ISSUED DURING AUGUST, 1988. 1374

In re: WILEMAN BROS. and ELLIOTT, INC., and KASH, INC.
AMA Docket Nos. F&V 916-3 and 917-4.
Order filed August 3, 1988.

Gregory Cooper, for Respondent.
Brian C. Leighton, Fresno, California, for Petitioner
Order issued by Donald A. Campbell, Judicial Officer

ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER DENYING INTERIM RELIEF

Petitioners' motion for reconsideration of the Judicial Officer's order of July 8, 1988, denying interim relief is denied because it is the view of the Judicial Officer that it is not appropriate for the Judicial Officer to grant interim relief in any case under the Agricultural Marketing Agreement Act of 1937, as amended, irrespective of whether an enforcement action has been filed or is likely to be filed. See *In re Sequoia Orange Co.*, 43 Agric. Dec. 1719, 1719-20 (1984).

In re: ERVIN STEBANE.
AWA Docket No. 410.
Decision and Order filed August 16, 1988.

Failure to allow inspection of records and facilities--Failure to maintain facilities housing dogs and cats.

The Judicial Officer affirmed Chief Judge Campbell's decision and order suspending respondent's license for 20 days and thereafter until he demonstrates to APHIS that he is in full compliance with the Act, regulations and standards, assessing a civil penalty of $1,500, and directing respondent to cease and desist from numerous practices involving the care and housing of dogs and cats, from failing to allow inspection of respondent's records, and from failing to allow inspection of respondent's facilities. The violations were willful, as that term is used in the Administrative Procedure Act. Respondent's housekeeping violations were mostly trivial, but warrant a sanction because of the continuous nature of the violations. If there had not been extenuating circumstances as to respondent's refusals to permit inspections of records and facilities, the sanction would have been more severe.

John Griffith, for Complainant.
Eugene Bartman, Oshkosh, Wisconsin, for Respondent.
Initial decision issued by John A. Campbell, Administrative Law Judge.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), and the regulations and standards issued thereunder (9 C.F.R. § 1.1 *et seq.*). On March 2, 1987, (then Chief) Administrative Law Judge John A. Campbell (ALJ) issued an initial Decision and Order suspending respondent's license for 20 days, assessing a civil penalty of $1,500, and directing respondent to cease and desist from numerous practices involving the care and housing of dogs and cats, from failing to allow inspection of respondent's records, and from failing to allow inspection of respondent's facilities.

On April 6, 1987, complainant appealed to the Judicial Officer, to whom inal administrative authority has been delegated to decide the Department's ases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] The case was eferred to the Judicial Officer for decision on April 24, 1987.

[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 J.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *eprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was ppointed in January 1971, having been involved with the Department's regulatory programs ince 1949 (including 3 years' trial litigation, 10 years' appellate litigation relating to appeals from he decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and tockyards Act regulatory program).

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, with several changes too trivial to itemize. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Statement

This is a disciplinary proceeding under the Animal Welfare Act (7 U.S.C. §§ 2131 *et seq.*, hereafter called the "Act"), instituted by a complaint filed on July 11, 1986, by the Administrator of the Animal and Plant Health Inspection Service (hereafter "APHIS"), United States Department of Agriculture. The complaint alleges that the respondent willfully violated the Act, and the regulations and standards issued pursuant to the Act, 9 C.F.R. § 1.1 *et seq.*, regarding cleaning, sanitation, and housekeeping functions at respondent's facilities.

An answer was filed on August 8, 1986, which admitted the jurisdictional allegations of the complaint. With respect to the remaining allegations, respondent denied violating the Act and/or alleged that the deficiencies were corrected.

A hearing was held in this proceeding on November 13 and 14, 1986, in Oshkosh, Wisconsin. John D. Griffith and Mary K. Hobbie of the Office of the General Counsel, United States Department of Agriculture, appeared on behalf of the complainant. Eugene A. Bartman of the Curtis-Wilde Law Office, appeared on behalf of respondent. At the close of the hearing, the time was set for the filing of briefs.

Hereafter transcript references will be as follows: Tr. I, (p. #) for the hearing transcript of November 13, 1986; Tr. II, (p. #) for the hearing transcript of November 14, 1986. Where applicable complainant's exhibits will be cited Cx ____, and respondent's exhibit as Rx ____.

Findings of Fact

1. Ervin Stebane (hereafter the "respondent") is an individual doing business at Rural Route #4, Kaukauna, Wisconsin 54130.

2. The respondent, at all times material herein, operated as a dealer as defined in the Act and held a Class B license (No. 36-B-9) issued under the Act. Respondent was first licensed in 1967, and is the largest Class B dealer in Wisconsin.

3. At the time of respondent's application for a license, he received a copy of the regulations and standards promulgated under the Act and agreed in writing to comply with them.

4. APHIS inspected respondent's facilities on February 15, February 22, and March 6, 1985 (Cx 5, 6, 7), and discovered numerous conditions which constitute violations of the regulations and standards issued under the Act.

5. In a certified letter dated April 18, 1985 (Cx 8), APHIS informed the respondent that the above-mentioned inspections had disclosed conditions constituting violations of the regulations and standards, advised him of his obligations under the Act, regulations, and standards, and afforded him an opportunity to achieve compliance. The letter reads in part as follows:

> The U. S. Department of Agriculture has information which indicates that you have not maintained your animal facilities (dogs, cats, opossums) in compliance with various husbandry standards of the Animal Welfare Act (AWA) (Public Law 94-279). Such information is based on inspections of your facilities on February 15, 1985; February 22, 1985; and March 6, 1985.
>
> The specific alleged violations are as follows:
>
> Section 3.1(c) - Storage of Food
> Supplies of animal food, such as ground meat and cheese, have been stored outdoors in uncovered containers, thereby exposing the food to contamination or infestation by vermin.
>
> Section 3.2(b) - Interior Surfaces
> The interior building surfaces of each of your three animal buildings were not substantially impervious to moisture, as required. As instructed earlier on your inspection reports, you shall have until June 1, 1985, to correct this deficiency.
>
> Section 3.4(a) - General Requirements
> The wire fencing between the outdoor runs in building 1 is not in good repair to protect the dogs and cats from injury, to contain them, and to keep predators out, as required.
>
> This is to advise you that the Department does not intend to seek prosecution in this matter, but continued failure to abide by the Act, regulations, and standards may be deemed willful by the Department and legal proceedings may be initiated.

6. The three violations listed in the warning letter of April 18, 1985, were corrected. (Tr. II 36; Cx 1, 2)

7. APHIS reinspected the respondent's facilities on May 2, 1985 (Cx 1), and found the following violations of section 2.100(a) of the regulations, 9 C.F.R. § 2.100(a), and the standards issued under the Act:

a. Respondent failed to provide adequate lighting in an indoor housing facility;

b. Respondent failed to maintain interior building surfaces substantially impervious to moisture; and

c. Respondent failed to provide litter boxes in primary enclosures for cats.

8. APHIS reinspected the respondent's facilities on August 2, 1985 (Cx 2), and found the deficiencies from the previous inspection (Finding 7 above) were corrected (Tr. I 34), but found the following new violations of section 2.100(a) of the regulations, 9 C.F.R. § 2.100(a), and the standards issued under the Act:

a. Respondent failed to provide a suitable method to rapidly eliminate excess water;

b. Respondent failed to provide clean watering receptacles; and

c. Respondent failed to remove an accumulation of excreta from primary enclosures.

9. APHIS reinspected the respondent's facilities on October 7, 1985 (Cx 3), and found the following violations of section 2.100(a) of the regulations, 9 C.F.R. § 2.100(a), and the standards issued under the Act:[1]

a. Respondent failed to make adequate provisions for the removal of animal waste and bedding along the sides of the facility near the pens;

b. Respondent failed to provide adequate storage for food (food freezer was not clean at the time of inspection);

c. Respondent failed to provide a litter box in a primary enclosure for cats;

d. Respondent failed to provide adequate space for cats (standards required 2-1/2 sq. ft. per cat; 12 cats were housed in a 5x5 ft. enclosure);

e. Respondent failed to provide clean food receptacles;

f. Respondent failed to provide clean watering receptacles;

g. Respondent failed to remove an accumulation of excreta and other debris from wire flooring of a primary cat enclosure; and

h. Respondent failed to keep the premises clean and free from trash.

10. While subsequent inspections (Cx 9, 10, 11, 12 and 13) disclose the eventual correction of the deficiencies in Findings 8 and 9, additional deficiencies were found by APHIS which also were eventually corrected. During all inspections, beginning in February 1985, respondent was cited for one or more deficiencies (Tr. I 230-231, II 9, 125, 147).

11. During the October 7, 1985, inspection, respondent did not furnish records to the APHIS inspector. The APHIS inspector testified that respondent said he was too busy. Respondent on the other hand testified that his wife, who maintained the records, was in the hospital. Whatever the reason, there was a failure to furnish the records at a reasonable time during ordinary business hours.

---

[1] The deficiency noted in Finding 8a was corrected during the October 7, 1985, inspection (Cx 3; Tr. I 90).

Said records were to be furnished by October 9, but reinspection was not attempted until November 7, 1985. (Cx 3; Tr. I 41, 123-124, 158, II 120-121).

Respondent's records were made available on the next inspection of April 7, 1986 (Cx 9).

12. An APHIS inspector attempted to reinspect the respondent's facilities on November 7, 1985, but declined to do so because of respondent's conduct. Respondent invited the inspector to inspect, but told the inspector to stop harassing him. Respondent made disparaging remarks about the inspector's personal conduct and questioned her use of common sense in the conduct of prior inspections, while holding a hammer in his hand which he had been using to repair a fence. (Cx 4; Tr. I 45, 128-130, II 65-69, 235-236).

Respondent's conduct impeded the reinspection and constituted a refusal to permit the inspection.

Conclusions

All contentions of the parties raised in this proceeding, whether or not specifically noted herein, have been considered in the light of the record evidence in arriving at the conclusions which follow:

1. By reason of Findings of Fact 1-10, respondent has failed to maintain his facility in compliance with the regulations and standards and has willfully violated section 9 CFR 2.100 of the regulations and sections 9 CFR 3.1, 3.2, 3.3, 3.4, 3.5, 3.6 and 3.7 of the standards.

2. By reason of respondent's refusal to allow the inspection of records on October 7, 1985 (Finding of Fact 11) respondent has willfully violated the Act, 7 U.S.C. 2140, 2146 and sections 9 CFR 2.126, 2.75 of the regulations.

3. By reason of respondent's refusal to allow inspection of his facility on November 7, 1985, respondent has willfully violated the Act, 7 U.S.C. 2146.

These violations warrant the imposition of a severe sanction, i.e., $1,500 civil penalty, a 20-day suspension continuing until full compliance is achieved, and the cease and desist provisions requested by complainant.

Discussion

I

Review of the record as a whole indicates that the principal problem concerns respondent's failure to fully bring his facilities into compliance with the regulations and standards issued in accordance with the Act. This problem is best illustrated by the following excerpt from the hearing transcript, the redirect examination of Dr. Richard W. Bertz (Tr. I 230-232):

Q During the entire course of your inspections of Mr. Stebane's facility, did you ever have an inspection where you cited no alleged violations to the Act or regulations or standards under the Act?

A No, I did not.

Q Is it fair to say in all cases you found a deficiency or deficiencies?

A That's correct.

Q What pattern of compliance or noncompliance with the Act did you notice during your inspections of his facility?

A I saw from the time I rode with Katie to when the facility was my primary responsibility for doing the inspections a pattern of varying compliance with the minimum standards of the Animal Welfare Act, never being in full compliance with those minimum standards.

Q During the course of your inspections, did the Respondent attempt to correct certain deficiencies at times?

A Yes.

Q Was he successful in his corrections?

A On some of the deficiencies, yes.

Q At the same time that he was correcting certain deficiencies, did other items at his facility become deficient?

A In the interim between inspections, correct.

Q So that on each of your inspections, did you ever come across a time in which all conditions were in compliance with the Act and regulations and standards?

A No, I did not.

Q Does Mr. Stebane have a responsibility to comply with the Animal Welfare Act at all times?

A Yes, he does.

Q How does the number of animals he keeps at the facility affect or alter his responsibility to comply with the Animal Welfare Act at all times?

A It has no bearing on his responsibility to meet the minimum standards.

The testimony of Dr. Gifford S. Jacobsen, also demonstrates the problem of respondent's recurring noncompliance, even while correcting prior deficiencies (Tr. I 13):

> Well, I think it shows good faith to a point, but again I think my main concern or my main point is that it seems that quite often it's a situation where he feels that he doesn't have to correct the deficiencies until our people come around and point these out and then oftentimes he will correct them sometimes on the spot. That's fine, but we're shooting for total compliance and we feel that it's the responsibility of the licensee to maintain the standards. It isn't the purpose of our inspectors to go around and point out these things they need to do. Certainly we do that, but our main function is to monitor these facilities, see if they are in compliance and the main function is not to tell them of things that need to be corrected and see that they do it.

Basically it is the pattern of respondent's recurring noncompliance which is the heart of the problem here. Taken individually (Findings 5-9), a number of violations are minor deficiencies and appear to fall within the Judicial Officer's concept of trivial violations. *In re Marlin U. Zartman*, 44 [Agric. Dec. 174 (1985)]. Other violations because of weather conditions or time needed to make the corrections, delayed the improvements required to effect compliance. There was never an adamant refusal by respondent to comply. Corrections were always made eventually, but new deficiencies developed. The sanctions imposed should deter this pattern of recurring noncompliance.

Respondent's brief considers each separate violation and urges with respect to each violation that the particular violation was not willful nor chronic. However, it is the totality of the violations which leads to the conclusion that the violations were repeated and willful. The violations were clearly willful, as that term is used in the Administrative Procedure Act (5 U.S.C. § 558(c)). *In re Shatkin*, 34 A.D. 296, 297-314 (1975). An "action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (CA 5, 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981). Further respondent was notified that continued noncompliance "may be deemed willful" (Finding 5).

Respondent further argues in his brief about the subjective interpretation of the regulations by the inspector involved in citing the violations. However the record indicates that the inspector's findings of deficiencies were corroborated by other APHIS personnel who accompanied the inspector on some of the inspections.

II

The matter of the failure to provide records (Finding of Fact 11) also seems to fall within the pattern of recurring noncompliance, but requires further discussion.

We are not concerned with the respondent's maintenance of records. He kept records and apparently the type of records maintained by respondent generally complied with 9 CFR 2.75. (Rx 1, Cx 1, 5, 7, 10, 11, 12).

Even some of the witness who testified on behalf of respondent (although not familiar with the Act) testified concerning respondent's concern for good records (Tr. II 211-212, 232).

The problem here is that the records were not made available at the time requested by the APHIS inspector. The hearing record indicates that APHIS previously sought respondent's records during an inspection on August 2, 1985. They were unavailable because Mrs. Stebane, who maintained the records, was ill. The inspector returned on August 5, and was shown the records (Cx 2, Rx 1; Tr. I 62-63, 100, II 105-106).

Again on October 7, 1985, APHIS sought respondent's records but they were not furnished (Finding of Fact 11). There seems to be a conflict in testimony regarding the reason for withholding the records. However, regardless of the reason the records were not furnished. Respondent had an obligation (particularly after receipt of the warning letter of April 18, 1985 - Finding 5) to take action between August 5 and October 7, to insure that the records were available during his business hours when inspections are held.

III

The refusal to permit an inspection on November 7, 1985 (Finding of Fact 12), is the only instance in the record where respondent interfered with an inspection of his facilities. Apparently annoyed by deficiencies noted by the inspector on a prior visit, respondent cautioned her not to harass him. This could only suggest to the inspector that respondent wanted no further deficiencies uncovered. Coupled with this admonition was the fact that respondent happened to hold a hammer in his hand. We must conclude that the purpose of such conduct by respondent was to intimidate the inspector and obstruct the performance of her duties in an unbiased manner. *Cf. In re Salsburg Meats*, 36 A.D. 1929, 1933 (1977). Such conduct was tantamount to a refusal to permit the inspection.

Sanction

Giving due consideration to all of the four factors contained in the Act, 7 U.S.C. 2149, i.e., size of the respondent's business, gravity of the violations, good faith, and history of previous violations, the sanctions

imposed are appropriate, reasonable, and necessary to achieve the remedial purpose of the Act, and to deter respondent and others from similar violations. Further in view of the nature of the violations considered here, the order issued herewith is consistent with the Department's severe sanction policy. *See: Rudolph Vrana*, 43 [Agric. Dec. 1758, 1766 (1984)].

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant appeals (Appeal of Complainant, April 6, 1987) only the sanction herein, and requests that the penalty provisions of the ALJ's order be increased to the level of complainant's originally requested sanction, *viz.*, a $5,000 civil penalty and a 90-day suspension, rather than the $1,500 civil penalty and the 20-day suspension imposed by the ALJ. Respondent argues in reply (Respondent's Response to Appeal of Complainant, April 20, 1987) that the ALJ's decision and order should not be disturbed.

After close scrutiny of the entire record herein, including the pleadings, the lengthy transcript, the exhibits, and the arguments on appeal, I affirm the ALJ's sanction, and the rest of the initial decision in all respects.

Complainant is, of course, correct that the Department's severe sanction policy anticipates that the Judicial Officer will place great weight upon the sanction recommended by agency officials (*In re Esposito*, 38 Agric. Dec. 613 (1979)). On the other hand, the Judicial Officer also places great weight upon the findings of fact, conclusions and order of the ALJ, whose job it is to examine the evidence of record and the credibility of the witnesses (*In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ____, slip op. at 174 (Mar. 19, 1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988)). Thus, in reviewing the sanction imposed in the initial decision, the Judicial Officer looks to ensure that the congressional objectives are met, and that the remedial purposes of that Act are achieved, such that respondent, and others will be deterred from future noncompliance with the Act, and its standards and regulations.

Since respondent on appeal no longer contests the violations, the only real issue left is the correct sanction to be imposed. In a recent case, the three objectives of the Act were set forth from its legislative history (*In re Hickey*, 47 Agric. Dec. ____, slip op. at 13 (May 27, 1988), *appeal docketed*, No. 88-7281 (9th Cir. July 22, 1988)), as follows:

> The Animal Welfare Act was enacted in 1966 to achieve three objectives:
>
> > "The purposes of this bill, as amended, are (1) to protect the owners of dogs and cats from theft of such pets, (2) to prevent the use or sale of stolen dogs or cats for purposes of research or experimentation and (3) to establish humane standards for the treatment of dogs, cats and certain other animals . . . by animal dealers and medical research facilities."

(Senate Report No. 1281, June 15, 1966; 2 U.S. Cong. & Admin. News 66, at 2635.)

> In 1976 the Act was amended (Pub L. 94-279) to restate and explain those objectives, which are at the heart of this proceeding.
>
> To better prevent the sale of stolen pets, the Act requires animal dealers to make and keep such records of "the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe". (7 U.S.C. § 2140.) Moreover, dogs and cats must be marked and identified by dealers as specified by the Secretary (7 U.S.C. § 2141).
>
> Congress also directed the Secretary to establish standards for humane care and treatment which dog and cat dealers must observe as the minimum requirements for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, and adequate veterinary care (7 U.S.C. § 2143).

This record reveals no involvement by respondent in stolen animals, leaving only the third objective for scrutiny. Respondent committed numerous housekeeping violations. I agree with the ALJ (Initial Decision at 10-11) that the violations were for the most part trivial within the concept established in *In re Zartman*, 45 Agric. Dec. 174 (1985), and that the seriousness results from the continuous nature of the violations. I believe respondent made good faith efforts to achieve compliance, and the sanction herein should be sufficient to chasten respondent to do a better job in the future.

I also agree with the ALJ that respondent's actions on two occasions (August 2, 1985, and October 7, 1985), regardless of his reasons, served unlawfully to withhold business records from APHIS (Initial Decision at 12-13). Moreover, respondent acted in such a manner as to refuse inspection of his facilities on November 7, 1985, and, apparently, threatened and obstructed the inspector on that date.

In summary, respondent has had continuous housekeeping problems, has twice not produced business records on proper demand, and, has once prevented a duly-appointed APHIS inspector from inspecting the premises. Respondent raised plausible (but nonetheless unacceptable) excuses, reasons and defenses to each of these points.

The Act (7 U.S.C. § 2149) requires that sanctions be imposed only after due consideration of four factors: business size, gravity of violations, good faith, and history of previous violations. Although respondent's business is large relative to other Wisconsin operations, respondent's business in real terms is not that large. The violations, while serious, did not directly endanger the lives of any animals. There were no resultant

hurt, abused, or sick animals disclosed in the record. In fact, not only did respondent not exhibit any cruel or inhumane treatment of animals in his care, there was a tremendous outpouring of testimony from neighbors, friends, etc., in the local community, that just the opposite was true of this respondent. As already stated, I believe that respondent did act in good faith to comply, albeit ineffectively. Respondent had been in business about 20 years, and had had no regulatory problems until this complaint.

The ALJ properly applied the above criteria to the facts herein, and imposed the proper sanction which "is consistent with civil penalties assessed in other comparable cases" (*In re Robinson*, 42 Agric. Dec. 7 (1983)). The $1,500 civil penalty assessed against respondent, together with the 20-day suspension, are adequate to serve as an effective deterrent to future violations by respondent and others.

In affirming the ALJ's sanction, which is substantially less severe (or, less than one-third as severe) than that recommended by APHIS, I caution that no one should misconstrue that respondent's violations are not serious. The violations are serious. However, cease and desist provisions herein will operate with the 20-day suspension properly to achieve full compliance. This sanction allows APHIS to prevent the lifting of the suspension *until respondent achieves full compliance*, which was the very reason that these trivial housekeeping violations became serious.

The civil penalty of $1,500 is appropriate because of respondent's good faith attempts to comply, and because of the somewhat extenuating circumstances of respondent's refusals to permit inspections of records (on two occasions) and facilities (on one occasion). Had there been evidence of an adamant refusal in either the records or the facilities inspections, then the $5,000 civil penalty would have been imposed.

For the foregoing reasons, the following order should be issued.

Order

Respondent Ervin Stebane shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 C.F.R. §§ 1.1-3.142, and shall cease and desist from any violation thereof. In particular, respondent, his agents and employees, directly or through any corporate or other device, shall cease and desist from failing to:

1. Make adequate provisions for the removal of food wastes and bedding as required by 9 C.F.R. § 3.1;
2. Provide adequate storage for food as required by 9 C.F.R. § 3.1;
3. Provide litter boxes in primary enclosures for cats as required by 9 C.F.R. § 3.4;
4. Provide adequate space for cats as required by 9 C.F.R. § 3.4;
5. Provide clean food receptacles as required by 9 C.F.R. § 3.5;
6. Provide clean watering receptacles as required by 9 C.F.R. § 3.6;

7. Remove debris and excreta from primary enclosures as required by 9 C.F.R. § 3.7;

8. Keep the premises clean and free from trash as required by 9 C.F.R. § 3.7;

9. Provide a suitable method to rapidly eliminate excess water as required by 9 C.F.R. § 3.3;

10. Provide adequate lighting in indoor housing facilities as required by 9 C.F.R. § 3.2;

11. Maintain interior building surfaces so as to be substantially impervious to moisture as required by 9 C.F.R. § 3.2;

12. Allow inspection of respondent's records as required by 9 C.F.R. § 2.75; and

13. Allow inspections of respondent's facilities as required by 7 U.S.C. § 2146.

Respondent is hereby assessed a civil penalty of $1,500, which shall be paid not later than the 90th day after service of this order, by certified check or money order made payable to the Treasurer of the United States, and sent to John D. Griffith, Esq., United States Department of Agriculture, Office of the General Counsel, Room 2014, South Building, Washington, D.C. 20250-1400.

Respondent's license (No. 36-B-9) is suspended for 20 days and thereafter until he demonstrates to APHIS that he is in full compliance with the Act and the regulations and standards issued thereunder. When respondent demonstrates to APHIS that he is in full compliance with the Act and the regulations and standards issued thereunder, a supplemental order will be issued in this proceeding, upon the motion of APHIS, terminating this suspension after the expiration of this 20-day period.

The cease and desist provisions of this order shall become effective on the day after service of this order on respondent, and the suspension provisions of this order shall become effective on the 30th day after service of this order on respondent.

In re: ZOOLOGICAL CONSORTIUM OF MARYLAND, INC., and RICHARD HAHN.
AWA Docket No. 401.
Decision and Order filed August 16, 1988.

Exhibitor--Failure to maintain facilities, primary enclosures and interior building surfaces--Violated standards for strength, storage of food and ventilation.

The Judicial Officer affirmed Chief Judge Campbell's decision and order suspending respondents' license for 20 days, and thereafter until compliance is achieved, assessing a civil penalty of $1,000, and directing respondents to cease and desist from numerous practices involving the care and housing of exhibited animals, including sanitation, structures, and housekeeping functions at respondents' facilities. The proof here surpasses the preponderance of the evidence, which is all that is required. Respondents' violations were willful, but willfulness is not required because respondents had received a prior warning letter. Respondents' violations were mostly trivial, but are serious because of the continuous nature of the violations The sanction proposed by the Chief ALJ is appropriate to deter future violations.

John Griffith, for Complainant.
Mark Dopp, Washington, D.C., Richard Parsons, co-counsel, Reston, Virginia, for Respondents.
Initial decision issued by John A. Campbell, Administrative Law Judge.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), and the regulations and standards issued thereunder (9 C.F.R. § 1.1 *et seq.*). On March 16, 1987, (then Chief) Administrative Law Judge John A. Campbell (ALJ) issued an initial Decision and Order suspending respondents' license for 20 days, and thereafter until compliance is achieved, assessing a civil penalty of $1,000, and directing respondents to cease and desist from numerous practices involving the care and housing of exhibited animals, including sanitation, structures, and housekeeping functions at respondents' facilities.

On May 22, 1987, respondents appealed to the Judicial Officer, to whom ıal administrative authority has been delegated to decide the Department's ıses subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).* On June 17,)87, complainant filed a petition in opposition to respondents' appeal, which :tition also contains a cross-appeal for increased sanctions. The case was eferred to the Judicial Officer for decision on July 21, 1987.

* The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer, and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, with several changes too trivial to itemize. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Statement

This is a disciplinary proceeding under the Animal Welfare Act, 7 U.S.C. §§ 2131-2156 (hereafter called the "Act"), instituted by a complaint filed May 5, 1986, by the Administrator of the Animal and Plant Health Inspection Service (hereafter called "APHIS"), United States Department of Agriculture. The complaint alleges that the respondents willfully violated the regulations and standards issued pursuant to the Act, 9 C.F.R. § 1.1-3.142, regarding sanitation, structure, and housekeeping functions at respondents' facilities.

An answer was filed on behalf of respondents on June 3, 1986. There was no response to the jurisdictional allegations of the complaint, however, respondents denied the substantive allegations and any willful violations of the Act.

A hearing was held in this proceeding on October 22 and 23, 1986, in Emmitsburg, Maryland. On December 16, 1986, the hearing was reopened to retake testimony which was given on the morning of October 22, 1986, and lost by the reporter. John D. Griffith of the Office of the General Counsel, United States Department of Agriculture, appeared on behalf of complainant. Richard Hahn appeared on behalf of himself and respondent Zoological Consortium of Maryland. At the close of the reopened hearing the time was set for the filing of briefs.

Hereafter transcript references will be cited Tr. (page number), while complainant's exhibits will be cited Cx #, and respondents' exhibits as Rx #.

Findings of Fact

1. Respondent, Zoological Consortium of Maryland, Inc., is a corporation with its mailing address at 13019 Catoctin Furnace Road, Thurmont, Maryland 21788; is and at all times material herein was, an exhibitor within the meaning of that term as defined in the Act and subject to the provisions of the Act and the regulations and standards issued thereunder; and is, and at all times material herein was, licensed as a Class C licensee under the Act.

2. Respondent, Richard Hahn, is an individual whose business mailing address is 13019 Catoctin Furnace Road, Thurmont, Maryland 21788. Respondent Hahn, at all times material herein, was an exhibitor within the

meaning of that term as defined in the Act, and subject to the provisions of the Act and the regulations and standards issued thereunder.

3. Respondent, Zoological Consortium of Maryland, Inc. is (and at all times material herein was) owned, managed and controlled by Respondent Hahn. Respondent Hahn established its policies and directed its activities, including those which constitute the violations of the regulations and standards found herein. The zoo has been in existence since 1933 and respondent Hahn has been its director since 1966.

4. On January 25, 1985, Nancy E. Wiswall, Veterinarian In Charge, APHIS, sent respondent Hahn a letter concerning prior deficiencies. (Rx 6, Tr. 114) The letter reads in part as follows:

> I am pleased to see that you have made substantial progress toward bringing your exhibitor's premises into compliance with the Animal Welfare Act (AWA). I have received the most recent report of inspection of your place by Dr. Ulysses J. Lane, Veterinary Medical Officer for Veterinary Services, and Mr. Charles Langenfelder, Area Compliance Officer. I note that in your letter of intent, November 15, 1984, you agreed to correct the remaining few deficiencies by December 31, 1984.
>
> x x x x x x
>
> The report of alleged violation which was pending against you at our headquarters in Hyattsville, Maryland, will be dismissed. However, if in the future we find a major violation of the regulations or standards of the AWA, we will review the matter for possible prosecution. We hope that this will not be necessary.
>
> x x x x x x

5. APHIS inspected respondents' facilities on June 20, 1985, and discovered numerous violations of the regulations and standards issued under the Act. (Cx 7)

6. APHIS reinspected the respondents' facilities (Cx 3) on July 30, 1985, and found that six deficiencies noted during the previous June 20 inspection had been corrected, while five deficiencies still existed (Finding 6 a-e below).

The inspection also disclosed five new violations (Finding 6 f-i below).

The inspection of July 30, 1985, disclosed the following violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and of the standards issued under the Act (Cx 3):

a. The facility housing the muntjacs was not structurally sound. The frame was not square and was buckled in several places. Although the inspector did not physically probe the structure, it appeared in possible danger of collapse. Tr. 16, 227, 267-269, 299-304; Rx 1, Cx 16.

b Indoor housing facilities of the primate holding area had a strong odor of ammonia and were not adequately ventilated. A second fan was added at a later date by respondents to improve ventilation. Tr. 226-227, 269-270, 305-309.

c. Interior surfaces in the primate holding area were not substantially impervious to moisture. Approximately 8 out of 18 walls were in need of painting. Subsequent inspection disclosed some evidence of painting. Tr. 81, 270-271, 310-312.

d. Primary enclosures for primates contained holes with sharp edges The holes were located in stainless steel walls, were smooth and not jagged Tr. 271-272, 228-229, 353-354; Rx 2.

e. Primary enclosures for primates contained an excessive accumulation of excreta. The inspector noted some improvement on the July 30 inspection. Tr. 271-272, 317.

f. The facilities housing the mountain lions, bobcats, jaguar, leopard, bengal tigers, black leopard, and the sun bear were not maintained in good repair and did not protect the animals from injury.[1]

Among other things, there were cracks in dens, rusting enclosure fences, sharp ends on wire fencing enclosing silos, and flimsy floor with rusting iron bars in Bengal Tiger den. Tr. 5-6, 10-15, 27-29, 36, 272-275; Cx 9, 12, 14, 15.

Respondents attempted, and did correct, some of the deficiencies Tr. 88-90, 95, 165, 173, 205, 208, 230; Rx 5, 10.

g. The facility housing the camel was not maintained in good repair Tr. 7, 9, 229, 273; Cx 10, 11, Rx 3.

h. The facility housing the coyote cubs was not clean and was not maintained in good repair so as to protect the animals from injury. Tr. 275. Subsequently, respondents removed a broken wire used to hold a water dish to avoid injury to the cubs. Tr. 230; Rx 4.

i. Supplies of food were not stored in such a way as to protect them from infestation and contamination by vermin. Although respondents maintained a permanent facility for the storage of animal feed, the problem involved open bags of food found in the primate enclosure. Tr. 236-237, 252-253, 276-277, 340-341; Rx 11, 12.

7. Inspections conducted after July 30, 1985, disclosed some deficiency corrections, a recurrence of earlier violations, and new deficiencies. Cx 20, 21, 22, 23, 24.

[1] Combines allegations 6 and 7 of the complaint.

Conclusions

All contentions of the parties raised in this proceeding, whether or not specifically mentioned herein, have been considered in the light of the record evidence.

By reason of the findings of fact, it is concluded that respondents have failed to maintain their facility in compliance with, and have willfully violated, section 2.100 of the regulations and sections 3.75, 3.76, 3.78, 3.81, 3.125 and 3.131 of the standards.

These violations warrant the imposition of a $1,000 civil penalty, a 20-day suspension and prohibition continuing until full compliance is achieved, and the cease and desist provisions requested by complainant.

Discussion

The evidence adduced at the hearing demonstrates that respondents violated standards governing structural strength, storage of food, ventilation, maintenance of facilities, maintenance of primary enclosures, cleaning of primary enclosures, housekeeping, and interior building surfaces. These violations were not minor items that may have been momentarily deficient. Rather, the respondents' failure to meet the requirements of the standards was a recurring problem.

During the inspection on July 30, 1985, there were numerous violations, many of which were recurring. Although some corrective action was taken by respondents from time to time, each inspection disclosed that new items at the facility were in violation. The Act, regulations and standards contain minimum requirements which must be met by licensed dealers at all times.

Review of the record as a whole indicates that the principal problem concerns respondents' failure to fully bring the facilities into compliance with the regulations and standards issued in accordance with the Act. This problem is best illustrated by the testimony of Dr. Nancy E. Wiswall at pages 103 through 109 of the record:

> We have the history of violations that have -- some of which have not been corrected, others which have been corrected temporarily. Seldom have they lasted. There has been no sense of real improvement during those four years. We've repeated what's gone on over and over again. We've gone in, we've seen deficiencies, we've gone back.
>
> On each inspection there has been deficiencies. There's never been a time in four years that there haven't been deficiencies. And this is with four veterinarians going in there, so it's not just one inspector's views on that.
>
> On each re-inspection we see certain deficiencies have been corrected, others that wouldn't be. Some of those that were corrected were again deficiencies the next time. Some of these deficiencies that are in here were deficiencies four years ago.

x x x x x x

I think that for myself and for the inspectors who have been out there, there has been a decreasing belief in Mr. Hahn's good faith. I think each of the veterinarians that have been out there have initially -- has believed Mr. Hahn's good intentions, and then found that what he said he would do he does not do. And what he --in some cases what he says he will do has been done in a very band-aid type temporary fashion.

And so each of the four inspectors, I think, have very honestly tried to communicate with Mr. Hahn as fully as possible and have believed that he would respond to the deficiencies that are cited and not only in response as a reaction, but that he understood what he eded to do to have the place in compliance that did need for an inspector come up there and point them out.

And I think that what I have seen is that each of them have gotten disillusioned with the fact that he didn't follow up. And I have felt the same way. He seems to be very familiar with what needs to be done. He's been a licensee for many years, and we all understand that he's got financial limitations. He has problems getting and keeping employees.

But ultimately it doesn't serve as an excuse to be continually out of compliance. And there I see no change. I see no -- I see a degree of improvement, but it's still not enough to bring it into compliance.

x x x x x x

Mr. Hahn has limited resources and yet he will not reduce the number of animals he has. If he had less animals, he would have a much better opportunity to care for them so that the animals in the facilities would be under compliance. And I see no way over the four-year period that I've been involved with this facility that he understands what the situation is, too many animals for the resources. And he will not modify that.

The first witness called by the complainant at the hearing was Dr. Michael vid, D.V.M., a Veterinary Medical Officer with APHIS. Dr. David testified ut conditions at the respondents' facility which he observed during the rse of an inspection on July 30, 1985. During this inspection, Dr. David erved ventilation problems in the primate house, noting that there was a y strong odor of ammonia which would eventually lead to respiratory lining tation in the primates. Primary enclosures in the primate building had ling paint and eroding surfaces

and the enclosures were not substantially impervious to moisture and therefore could not be properly cleaned and disinfected. Dr. David also testified regarding cleaning and sanitation in the primate enclosure stating that there were excessive accumulations of excreta which posed a health hazard for the primates.

Dr. David also testified regarding exotic animals other than primates that were present at the respondents' facility on July 30, 1985. Dr. David testified that the enclosure housing the muntjac needed reinforcement in that the frame was not square and that it would collapse if given time. He testified that when he inspected the facilities housing the mountain lions, bobcat, jaguar, leopard, bengal tigers, and the sun bear, he discovered that there was significant rusting of the fencing which resulted in broken and sharp edges which could lead to potential injury and laceration. Dr. David testified that the jaguar and black leopard dens had significant cracks which made it difficult to sanitize the dens, thereby increasing the potential for injury to the animals. He discovered other conditions in violation of the standards such as buckled fencing around the camel enclosure, which created a risk of injury to the animal, a coyote cub in a cage with a broken water rack with sharp edges located where the animal could be injured, a coyote cub enclosure which was full of excrement, spilled feed and water, and open feed bags in the primate holding area which created a risk of contamination of the area by roaches and other vermin. (Tr. 269-277)

Accompanying Dr. David on the July 30, 1985, inspection was Ms. Susan Horowitz, a Compliance Officer for APHIS, whose testimony corroborated the findings of Dr. David.

Assertions contained in respondents' brief that the regulations are imprecise, and that the inspectors were inexperienced, are without merit. The record discloses no infirmity in the language of the regulations and standards as it pertains to the violations considered here. Likewise the record demonstrates that the inspectors were qualified to conduct the inspections, and that the procedures followed were proper.

On the other side of the coin, and as respondents note in section V(A) of their brief, there was no evidence of animal abuse or inhumane treatment of animals at respondents' facilities. Moreover, respondents' exhibits 9 and 10 indicate an in-house program of animal care and facility maintenance by respondents. (Tr. 199-219, 243-249)

Dr. Joseph Irwin, associate editor of National Geographic Research, a scientific journal of the National Geographic Society, testified on behalf of respondents. Dr. Irwin is an expert on primates, who also had some familiarity with the Act at the Brookfield Zoo where he was curator for primates for the Chicago Zoological Society. (Tr. 149-152, 170-173)

Dr. Irwin acknowledged existing deficiencies at respondents' zoo (Tr. 154-156, 173) but testified that primate enclosures will always have a strong odor regardless of the ventilation system in use, and that primates quickly scratch up the walls after painting. (Tr. 155-156). Further, Dr. Irwin described many outstanding features of the zoo: rare primates, and the

unusual spider monkey island. (Tr. 158-162). Dr. Irwin cautioned that a total aseptic environment is not good for animals in captivity. (Tr. 164)

Dr. Irwin also discussed the development of plans and future funding for improvements at the zoo (Tr. 157-158), and suggested that the imposition of a $6,000 penalty would adversely affect future improvements at the zoo. (Tr. 163)

Respondent Hahn testified that he had made over $25,000 in capital improvements to the facility over the past two years, and spoke of future plans to obtain funds for future improvements. (Tr. 240-241).

Sanction

The testimony on behalf of respondents, while indicative of good intentions to improve the facilities, does not excuse the violations which existed during the July 30, 1985, inspection.

Further, the warning letter of January 25, 1985 (Finding of Fact 4), informed the respondents that further major violations of the regulations or standards would be reviewed for possible prosecution. Notwithstanding this notice, the respondents continued to operate their facility in violation of the Act, regulations and standards as charged in the complaint.

The Secretary's established sanction policy for disciplinary cases arising under the Animal Welfare Act and similar statutes provides that it is the Department's policy to assess severe sanctions for serious violations of the Act and the regulations and standards. *In re Esposito*, 38 A.D. 613 (1979). This policy is intended to deter further violations by the present respondents and other persons subject to regulations, in order to achieve the remedial purposes of the Act. *See, In re Christ*, 35 A.D. 195 (1976); *In re Worsley*, 33 A.D. 1547 (1974).

Giving due consideration to all of the four factors contained in the Act, 7 U.S.C. 2149(b), i.e., size of the respondents' business, gravity of the violations, good faith, and history of previous violations, the sanctions imposed are appropriate, reasonable, and necessary to achieve the remedial purpose of the Act, and to deter respondents and others from similar violations. Further, in view of the nature of the violations considered here, the order issued herewith is consistent with the Department's severe sanction policy, and at the same time will not stifle respondents' plans for future improvements after compliance with the Act is achieved.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents contend on appeal that the ALJ's findings and conclusions are not adequately supported by the record, but the record abundantly supports the ALJ's findings and conclusions. In fact, the proof here

surpasses the preponderance of the evidence, which is all that is required.[2] Other recent Animal Welfare Act decisions illustrate this proper standard (e.g., *In re Hickey*, 47 Agric. Dec. ____ (May 27, 1988), *appeal docketed*, No. 88-7281 (9th Cir. July 22, 1988) and see *In re Sabo*, 47 Agric. Dec. ____ (Mar. 15, 1988)). Respondents' arguments on appeal, in this respect, merely reargue matters that were fully considered and correctly decided by the ALJ

Respondents contend that their violations were not willful, but a violation is willful if the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements.[3] Respondents' actions certainly fit within this definition of willful. But, assuming, *arguendo*, that they did not, respondents' actions would still warrant a suspension order because respondents had received a prior warning letter, which fulfills the requirements of the Administrative Procedure Act (5 U.S.C. § 558(c)). This principle was recently restated in the *Rodman* case (*In re Rodman*, 47 Agric. Dec. ____ (May 27, 1988)), as follows:

> V. Respondents' Violations Were Willful
>
> Under the Administrative Procedure Act, a suspension order cannot be issued unless the violations were willful or a prior warning letter was sent. Specifically, the Act provides (5 U.S.C. § 558(c)):
>
> > Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given--
> >
> > (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
> >
> > (2) opportunity to demonstrate or achieve compliance with all lawful requirements.
>
> Respondents' violations were willful, within the meaning of that term in the Administrative Procedure Act. As stated in *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir. 1974):

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[2] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983), *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983), *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

[3] For an extensive discussion of the meaning of the term willful, as applied by the Department, *see In re Shatkin*, 34 Agric. Dec. 296, 297-314 (1975).

> Moreover, the "second chance" doctrine would apply only if the violations had not been willful. It is clear enough that under § 9(b), doing an act which is prohibited and doing it intentionally "irrespective of evil motive or reliance on erroneous advice" or "acts with careless disregard of statutory requirements" are willful. *See* Goodman v. Benson, 286 F.2d 896, 900 (7th Cir. 1961); *see also* United States v. Illinois Central Railroad Co., 303 U.S. 239, 243, 58 S.Ct. 49, 82 L.Ed. 518 (1938).

Similarly, in *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961), the court held:

> Petitioner urges his denial of trading privileges amounted to a suspension of a license, and that section 9(b) of the Administrative Procedure Act, 5 U.S.C.A. § 1008(b), was violated. We do not reach that question for the same section excludes cases of wilfulness. We hold the petitioner's conduct was wilful within the meaning of section 9(b) of the Administrative Procedure Act. We think it clear that if a person 1) intentionally does an act which is prohibited,--irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements, the violation is wilful. Eastern Produce Co. v. Benson, 3 Cir., 278 F.2d 606, 609.

Respondents contend that the sanctions are too severe, but they are consistent with the Department's long-established policy to impose severe sanctions for violations that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents but also to other potential violators (*see In re Parchman*, 46 Agric. Dec. ___, slip op. at 67-77 (May 28, 1987) (90-day suspension and $10,000 civil penalty), *aff'd*, No. 3701 (6th Cir. July 22, 1988); *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ___, slip op. at 213-51 (Mar. 17, 1987) (10-year suspension and $30,000 civil penalty), *aff'd*, 841 F.2d 1451 (9th Cir. 1988)).

All of respondents' other arguments have been considered, including Respondents' Opposition to Complainant's Cross-Appeal Regarding Sanctions (July 16, 1987), and are found to be without merit, even though not specifically mentioned.

Complainant's cross-appeal seeks to have the ALJ's sanction increased to that originally sought by complainant, *viz.*, a $6,000 civil penalty and a 60-day suspension. Complainant is, of course, correct that the Department's severe sanction policy anticipates that the Judicial Officer will place great weight upon the sanction recommended by agency officials (*In*

re Esposito, 38 Agric. Dec. 613 (1979)). On the other hand, the Judicial Officer also places great weight upon the findings of fact, conclusions and order of the ALJ, whose job it is to examine the evidence of record and the credibility of the witnesses (*In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ____, slip op. at 174 (Mar. 19, 1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988)). Thus, in reviewing the sanction imposed in the initial decision, the Judicial Officer looks to ensure that the congressional objectives are met, and that the remedial purposes of that Act are achieved, such that respondent, and others will be deterred from future noncompliance with the Act, and its standards and regulations.

In a recent case, the three objectives of the Act were set forth from its legislative history (*In re Hickey*, 47 Agric. Dec. ____, slip op. at 13 (May 27, 1988), *appeal docketed*, No. 88-7281 (9th Cir. July 22, 1988)), as follows (emphasis added):

> The Animal Welfare Act was enacted in 1966 to achieve three objectives:
>
> > "The purposes of this bill, as amended, are (1) to protect the owners of dogs and cats from theft of such pets, (2) to prevent the use or sale of stolen dogs or cats for purposes of research or experimentation and (3) *to establish humane standards for the treatment of dogs, cats and certain other animals* . . . by animal dealers and medical research facilities." (Senate Report No. 1281, June 15, 1966; 2 U.S. Cong. & Admin. News 66, at 2635.)
>
> In 1976 the Act was amended (Pub L. 94-279) to restate and explain those objectives, which are at the heart of this proceeding.

Class "C" exhibitors are included within this mandate for "other animals" by the regulations (9 C.F.R § 1.1(w) and (aa)).

Respondents committed numerous housekeeping violations, which were for the most part trivial within the concept established in *In re Zartman*, 45 Agric. Dec. 174 (1985). Moreover, this aging zoo's structures are showing some of the ravages of time, and need repair. The seriousness, however, results from the continuous nature of the violations. I believe respondents made good faith efforts to achieve compliance, but the requirement is *compliance*. The sanction herein should be sufficient to chasten respondents to do a better job in the future, and to achieve full compliance.

In summary, respondents have had continuous housekeeping problems, and need to refurbish or repair aging structures at this somewhat elderly facility. Respondents raised plausible (but nonetheless unacceptable) excuses, reasons and defenses to each of these points.

The Act (7 U.S.C. § 2149) requires that sanctions be imposed only after due consideration of four factors: business size, gravity of violations, good faith, and history of previous violations. Although respondents'

business is probably large relative to some other private exhibitors, respondents' zoo in real terms is not that large. The violations, while serious, did not directly endanger the lives of any animals, or involve imminent injury to patrons. There were no resultant hurt, abused, or sick animals disclosed in the record. Respondents did not exhibit any cruel or inhumane treatment of their animals. As already stated, I believe that respondents did act in good faith to comply, albeit ineffectively. Respondent Hahn had been in charge of this business for about 20 years,
and had had no regulatory problems until this complaint. The zoo was established in 1933, long before passage of the Animal Welfare Act.

The ALJ properly applied the above criteria to the facts herein, and imposed the proper sanction which "is consistent with civil penalties assessed in other comparable cases" (*In re Robinson*, 42 Agric. Dec. 7 (1983)). The $1,000 civil penalty assessed against respondents, together with the 20-day suspension, are adequate to serve as an effective deterrent to future violations by respondent and others.

In affirming the ALJ's sanction, which is substantially less severe than that recommended by APHIS, I caution that no one should misconstrue that respondents' violations are not serious. The violations are serious. However, cease and desist provisions herein will operate with the 20-day suspension properly to achieve full compliance. This sanction allows APHIS to prevent the lifting of the suspension *until respondents achieve full compliance*, which was the very reason that these housekeeping violations became serious.

The civil penalty of $1,000 is appropriate because of respondents' good faith attempts to comply.

For the foregoing reasons, the following order should be issued.

Order

Respondents shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 C.F.R. §§ 1.1-3.142, and shall cease and desist from any violation thereof. In particular, respondents, their agents and employees, directly or through any corporate device, shall cease and desist from:

1. Failing to construct and maintain structurally sound indoor and outdoor facilities as required by 9 C.F.R. § 3.125;

2. Failing to provide adequate ventilation for indoor housing facilities as required by 9 C.F.R. § 3.76;

3. Failing to maintain interior building surfaces in indoor housing facilities that are substantially impervious to moisture as required by 9 C.F.R. § 3.76;

4. Failing to maintain primary enclosures in good repair so as to protect nonhuman primates from injury as required by 9 C.F.R. § 3.78;

5. Failing to remove excreta from primary enclosures as required by 9 C.F.R. § 3.8l;

6. Failing to maintain facilities for animals other than nonhuman primates so as to protect the animals from injury as required by 9 C.F.R. § 3.125;

7. Failing to clean primary enclosures so as to protect the animals from contamination and injury as required by 9 C.F.R. § 3.13l; and

8. Failing to store supplies of food so as to protect them from infestation or contamination by vermin as required by 9 C.F.R. § 3.75.

Respondents are hereby assessed a civil penalty of $1,000 to be paid not later than the 90th day after service of this order, by certified check or money order made payable to the Treasurer of the United States, and sent to John D. Griffith, Esq., United States Department of Agriculture, Office of the General Counsel, Room 2014, South Building, Washington, D.C. 20250-1400.

Respondent Zoological Consortium of Maryland, Inc.'s license is suspended for 20 days and thereafter until it demonstrates to APHIS that it is in compliance with the Act and the regulations and standards issued thereunder. When respondent Zoological Consortium of Maryland, Inc., demonstrates to APHIS that it is in compliance with the Act and the regulations and standards issued thereunder, a supplemental order will be issued in this proceeding, upon the motion of APHIS, terminating the suspension after the expiration of the 20-day period.

Respondent Hahn is prohibited from directly or indirectly engaging in business in any capacity for which a license is required under the Act for a period of 20 days and thereafter until he demonstrates to APHIS that he is in compliance with the Act and the regulations and standards issued thereunder. When respondent Hahn demonstrates to APHIS that he is in compliance with the Act and the regulations and standards issued thereunder, a supplemental order will be issued in this proceeding, upon a motion of APHIS, terminating this prohibition after the expiration of the 20-day period.

The cease and desist provisions of this order shall become effective the day after service of this order on respondents, and the suspension provisions of this order shall become effective on the 30th day after service of this order on respondents.

DISCIPLINARY DECISIONS

In re: COVINGTON SALE COMPANY, INC.
P&S Docket No. D 88-82.
Order filed August 9, 1988.

Ben Bruner, for Complainant.
Respondent, pro se
Order issued by Edward H. McGrail, Administrative Law Judge

ORDER DISMISSING COMPLAINT

For good cause shown in Complainant's motion filed August 5, 1988, it is ordered that the complaint in this matter, issued on June 29, 1988, be, and hereby is, dismissed.

In re: C. LeROY NOLL.
P&S Docket No. 6711.
Order filed August 8, 1988.

Peter V. Train, for Complainant
Respondent, pro se.
Order issued by Dorothea A. Baker, Administrative Law Judge

ORDER DISMISSING APPEAL

Respondent has filed a motion to withdraw his appeal from the decision issued by Administrative Law Judge Dorothea A. Baker on April 14, 1988, and has paid the civil penalty assessed in that order. Complainant has filed no objection to the withdrawal.

ACCORDINGLY, the appeal of C. LeRoy Noll is hereby dismissed.

In re: JAMES E. OLESEN.
P&S Docket No. 6909.
Supplemental Order filed August 25, 1988.

Ben Bruner, for Complainant.
Respondent, pro se
Order issued by Dorothea A Baker, Administrative Law Judge.

SUPPLEMENTAL ORDER

On April 14, 1988, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until he complied fully with the bonding requirements of the Packers and Stockyards Act, as amended and supplemented (7 U.S.C. § 181 *et seq.*) and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

The respondent is now fully in compliance with the bonding requirements of the Packers and Stockyards Act, as amended and supplemented (7 U.S.C. § 181 *et seq.*) and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*). Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued April 14, 1988, is terminated. The order shall remain in full force and effect in all other respects.

In re: SARCOXIE COMMUNITY SALES, INC.
P&S Docket No. 6762.
Decision and Order filed March 28, 1988.

Suspension and Cease and Desist Order.

Respondent found to have violated Act in that: (1) its current liabilities exceeded its current assets; (2) it failed to maintain properly its Custodial Account for Shippers' Proceeds; (3) it issued insufficient fund checks; (4) it failed to remit when due the full amount of the proceeds from sale of consigned livestock and it failed to keep and maintain proper records. Sanction: Cease and Desist Order and a 14-day suspension and thereafter until demonstration was made that it was solvent.

Charlene Lassiter, for Complainant.
Robert Stemmons, Mt. Vernon, Missouri, for Respondent.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is an administrative disciplinary proceeding brought before the Secretary of Agriculture by reason of a complaint having been filed on September 19, 1986 by the Administrator, Packers and Stockyards Administration, charging that the respondent herein incurred five violations of the Packers and Stockyards Act, 1921, as amended and supplemented (7

U.S.C. § 181 *et seq.*), hereinafter sometimes referred to as the Act, and, the regulations promulgated thereunder by the Secretary of Agriculture (9 C.F.R. § 201.1 *et seq*), hereinafter sometimes referred to as the regulations.

The complaint alleges, first, that the financial condition of the respondent does not meet the requirements of the Act (7 U.S.C. § 204), in that the respondent's current liabilities exceeded its current assets on December 31, 1985, and July 11, 1986, and continue to exceed its current assets at the present time. Second, the complaint alleges that the respondent willfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), in that it engaged in the business of a market agency selling livestock in commerce on a commission basis, notwithstanding the fact that its current liabilities exceeded its current assets, between December 31, 1985, and July 11, 1986. Third, the complaint alleges that the respondent willfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and Section 201.42 of the regulations (9 C.F.R. § 201.42), in that the respondent failed to maintain a balance in its Custodial Account for Shippers' Proceeds, hereinafter referred to as the "custodial account," sufficient to offset outstanding checks drawn on the account. Fourth, the complaint alleges that the respondent issued custodial checks in payment of the net proceeds due from the sale of consigned livestock, drawn on insufficient funds and returned unpaid by the bank. Consequently, the respondent failed to remit, when due, the full amount of the proceeds from the sale of the consigned livestock, in willful violation of sections 307 and 312(a) of the Act. (7 U.S.C. §§ 208, 213(a)). Finally, the complaint alleges that the respondent violated section 401 of the Act (7 U.S.C. §221), in that it failed to keep and maintain records which fully and accurately disclose the true nature of its operations subject to the Act.

Respondent filed an answer to the complaint on October 14, 1986, in which it denied the allegations of the complaint. On October 20, 1986, the respondent filed an amended answer in which it admitted the jurisdictional allegations and denied liability as to the remaining allegations.

An oral hearing was held herein on April 28, 1987, in Springfield, Missouri, before Administrative Law Judge Dorothea A. Baker. At that time the complainant was represented by Jory M. Hochberg, Esquire, and Sharlene W. Lassiter, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250. The respondent was represented by Robert E. Stemmons, Esquire, and Robert L. Stemmons, Esquire, Stemmons & Stemmons, 101 East Dallas - P.O. Box 389, Mount Vernon, Missouri, 65712. In due course the parties filed briefs, the last brief having been filed October 13, 1987. On January 25, 1988, respondent filed a Motion to Dismiss for Mootness which was denied on February 1, 1988.

Findings of Fact

1. Sarcoxie Community Sales, Inc., hereinafter sometimes referred to as the respondent, is a corporation organized and existing under the laws of the State of Missouri. Its business mailing address is P.O. Box 159, Sarcoxie, Missouri 64862.

2. Respondent is and at all times material herein was engaged in the business of conducting and operating the Sarcoxie Community Sales, Inc. stockyard, a posted stockyard under the Act; engaged in the business of selling livestock in commerce on a commission basis; and registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

3. Nelson White, D.V.M. is the president of the respondent. Mrs. Margaret White, is the wife of Dr. Nelson White, and the bookkeeper for the respondent.

4. Respondent submitted an Annual Report of Market Agency, hereinafter referred to as Annual Report, for the year ending on December 31, 1985, dated April 15, 1986, to the Packers and Stockyards Administration, Kansas City, Missouri, Regional Office, which shows a shortage in the custodial account in the amount of $16,767.89, resulting from a bank balance of $32,052.79 plus proceeds receivable of $4,709.49, minus outstanding checks of $53,530.17, current liabilities in the amount of $35,144.87, and current assets in the amount of $6,893.49.

5. On April 29, 1986, respondent received a notice dated April 24, 1986, by certified mail from the Packers and Stockyards Administration, Kansas City, Missouri, Regional Office, in response to the Annual Report submitted by the respondent. Mrs. Margaret White signed the certified return receipt for the respondent. The notice informed the respondent that, "a registrant is considered to be engaging in an unfair practice if he operated while his current liabilities exceed his current assets, or if he is unable to meet his obligations as they become due in the normal course of business."

6. On April 29, 1986, respondent received a notice dated April 24, 1986, by certified mail from the Packers and Stockyards Administration, Kansas City, Missouri, Regional Office, in response to the Annual Report submitted by the respondent. Mrs. Margaret White signed the certified return receipt for the respondent. The notice informed the respondent that, "a registrant is considered to be engaging in an unfair practice if he uses shippers' proceeds for the purposes of his own either through recourse to the so-called 'float' in the bank account or in any other manner. It is also considered to be an unfair practice if he makes such use or disposition of the custodial funds so as to endanger or impair the prompt accounting for and payment of the proceeds due the consignor or shipper of livestock."

7. On July 14, 1986, and continuing until July 17, 1986, Mr. Raymond G. Minks, Auditor, Packers and Stockyards Administration, Kansas City, Missouri, Regional Office, conducted an audit of the respondent's business records with the assistance of Ms. Margaret Mills, a Marketing Specialist in the Kansas City Regional Office.

8. Mr. Minks' analysis of respondent's custodial account revealed that as of December 31, 1985, the respondent had a shortage in its custodial account in the amount of $21,477.38. Respondent issued custodial checks in the amount of $53,530.17, which remained outstanding as of December 31, 1985. Respondent had to offset such checks against total debits of $32,052.79, which consist of the balance in the custodial bank account, no deposits in transit, and no proceeds receivable due to shippers. As of that date, the respondent did not have proceeds receivable, contrary to item 6, section 2, page 2 of respondent's Annual Report.

9. Mr. Minks' analysis of the respondent's custodial account revealed that as of July 11, 1986, the respondent had a shortage in its custodial account in the amount of $17,455.28. Respondent issued custodial checks in the amount of $22,087.22, which remained outstanding as of July 11, 1986. Respondent had to offset such checks against a total debit of $4,631.94, consisting of the balance in the custodial bank account, no deposits in transit, and no proceeds receivable due to shippers.

10. The respondent did not deposit in its custodial account, an amount equal to the proceeds receivable from the sale of consigned livestock, within the time set forth in the regulations.

11. Mr. Minks' analysis of the respondent's general account revealed that as of December 31, 1985, the respondent had an overdraft in its general account in the amount of $3,376.98. Respondent issued checks drawn on its general account in the amount of $4,640.72. Respondent had to offset such checks against a total debit of $1,263.74, which consisted of the balance in its general account and no deposits in transit.

12. As of December 31, 1985, respondent's current liabilities exceeded its current assets. As of that date, respondent had current liabilities totalling $39,854.36 and current assets totalling $6,893.87, resulting in an excess of current liabilities over current assets of $32,960.87.

13. On July 14, and continuing until July 17, 1986, Mr. Minks analyzed the financial condition of the respondent as of July 11, 1986.

14. Mr. Minks' analysis of respondent's financial condition revealed that as of July 11, 1986, respondent's current liabilities exceeded its current assets. As of that date, respondent had current liabilities totalling $103,169.55 and current assets totalling $4,881.31, resulting in an excess of current liabilities over current assets of $98,288.24.

15. Respondent contests the correctness of complainant's inclusion of $83,168.68 (an indebtedness in favor of Citizens' National Bank of Pierce City, Missouri) as a current liability. There is persuasive evidence of record (including default and an option of due and payable) to find that such indebtedness was properly included as a current liability.

16. Respondent engaged in the business of a market agency selling livestock in commerce on a commission basis, notwithstanding the fact that its current liabilities exceeded its current assets.

17. Respondent, during the period May 1, 1986, through July 1, 1986, issued custodial checks for $64,302.51 in payment of the net proceeds due from the sale of consigned livestock, drawn on insufficient funds and returned unpaid by the bank. Respondent did not have and maintain sufficient funds on deposit and available in the custodial account to pay such checks when presented. A tabulation of these checks is set forth on brief.

18. On the dates and in the transactions referred to in Finding of Fact No. 17, respondent failed to remit, when due, the full amount of the proceeds from the sale of consigned livestock. The dates on which the respondent remitted the full amount of the proceeds from the sale of consigned livestock are set forth on brief.

19. Respondent did not keep and maintain records which fully and accurately disclosed the true nature of its operations subject to the Act, in that respondent did not keep and maintain a general ledger, livestock inventory records, and adequate market support records sufficient to trace livestock from purchase to disposition.

20. There is no legal basis to support the respondent's argument that prior to finding a violation of the Act for inadequate recordkeeping, the Secretary must so find and prescribe the manner in which the respondent should maintain its records.

Conclusions

The respondent's failure to properly keep and maintain its custodial account is in violation of sections 307 and 312(a) of the Act (7 U.S.C §§ 208, 213(a)) and section 201.42 of the regulations (9 C.F.R. § 201.42). Section 307 of the Act provides, in pertinent part, that:

> (a) It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust,unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful. (7 U.S.C. § 208(a)).

Section 312(a) of the Act provides that:

> (a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, ... (7 U.S.C. § 213(a)).

Section 201.42 of the regulations provides, in pertinent part, that:

(b) Custodial accounts for shippers' proceeds. Every market agency engaged in selling livestock on a commission agency basis shall establish and maintain a separate bank account designated as "Custodial Account for Shippers' Proceeds," . . . .

(c) Deposits in custodial accounts. The market agency shall deposit in its custodial account before the close of the next business day (the next day on which banks are customarily open for business whether or not the market agency does business on that day) after livestock is sold (1) the proceeds from the sale of livestock that have been collected, and (2) an amount equal to the proceeds receivable from the sale of livestock that are due from (i) the market agency, (ii) any owner, officer, or employee of the market agency, and (iii) any buyer to whom the market agency has extended credit. The market agency shall thereafter deposit in the custodial account all proceeds collected until the account has been reimbursed in full, and shall, before the close of the seventh day following the sale of livestock, deposit an amount equal to all the remaining proceeds receivable whether or not the proceeds have been collected by the market agency.

(9 C.F.R. § 201.42(b) and (c)).

The evidence clearly shows that the respondent failed to maintain its custodial account in accordance with the Act and regulations as of December 31, 1985, and July 11, 1986. The statutory requirements of 307 and 201.42 prescribe the manner in which the respondent is to make deposits into the custodial account and otherwise maintain the account. In addition, the Judicial Officer holds that failure of a market agency to maintain its custodial account in a proper manner is an unfair and deceptive practice. *In re: Smithfield Livestock Market*, 36 Agri. Dec. 1546 (1977); *In re: Thumb Auction Markets, Inc.*, 37 Agric. Dec. 164 (1977). The custodial account is a fiduciary account which is designed to hold in trust proceeds which a market agency collects from the sale of livestock consigned to it for sale on a commission basis. (9 C.F.R. § 201.42(a)). (*United States v. Donahue Bros. Inc.*, 59 F.2d 1012, 1022 (8th Cir. 1932)). The respondent here had a deficit in its custodial account of $21,477.38 as of December 31, 1985. Although the respondent's Annual Report showed a deficit of $16,767.89, respondent did not have sufficient records to support its calculation. Mr. Minks testified that as a part of his analysis of the respondent's financial condition, he sought to verify the items reported on the Annual Report, specifically the $4,709.49 of proceeds receivable. Mr. Minks' analysis of the respondent's custodial account revealed that the respondent did not have any records such as invoices or deposit slips which would support the $4,709.49 of proceeds receivable. In the absence of any documentation of proceeds receivable, the respondent cannot justify a reduction of the custodial account deficit by $4,709.49. In addition, the

respondent presented neither evidence nor an explanation for the absence of any records in this regard at hearing. Therefore, the evidence is sufficient to prove that as of December 31, 1985, the custodial account had a shortage of $21,477.38 in violation of section 307 and 312(a) of the Act. (7 U.S.C. §§ 208, 312(a)).

Likewise, as of July 11, 1986, the respondent had a shortage in the custodial account of $17,455.28. Mr. Minks testified that during his investigation he reviewed the respondent's custodial bank statement's check stubs and bank reconciliation to analyze the account as of July 11, 1986, which revealed a shortage of $17,455.28 as of that date. Again, the respondent did not produce any evidence to challenge the results of Mr. Minks' analysis. Therefore, the respondent had a shortage in the custodial account as of July 11, 1986, of $17,455.28 in violation of section 307 of the Act. (7 U.S.C. § 208).

The shortages in the custodial account, as of December 31, 1985, and July 11, 1986, are due to respondent's failure to deposit, within the prescribed time, an amount equal to the proceeds due from the purchasers of consigned livestock. Section 201.42 of the regulations requires a market agency to deposit an amount equal to all proceeds from the sale of consigned livestock which it must remit to consignors by the close of the seventh day following the sale. (9 C.F.R. § 201.42). Mr. Minks testified that as of each date, he looked unsuccessfully for any deposits in transit of an amount equal to the proceeds due from purchasers which the respondent had yet to collect. Respondent proffered no explanation for the absence of deposits as required under section 201.42. Conclusively, the evidence shows that the respondent failed to make deposits into the custodial account of proceeds due from purchasers of consigned livestock in violation of section 201.42 of the regulations.

The shortages found to exist in the respondent's custodial account and the respondent's failure to maintain the custodial account are unfair and deceptive practices in violation of section 312(a) of the Act. The Judicial Officer consistently has held that the failure to maintain a custodial account in accordance with the section 201.42 by a market agency is an unfair and deceptive practice, and therefore a violation of sections 307 and 312(a) of the Act and section 201.42 of the regulations. *In re: Hugh B. Powell*, 41 Agric. Dec. 1354, 1361 (1982); *Smithfield Livestock Market*, 36 Agric. Dec. 1546 (1977). Mr. Merle Paulsen, Branch Chief, Financial Protection Branch, Livestock Marketing Division, Packers and Stockyards Administration, testified as to why improper management of a custodial account is unfair and deceptive, in that:

> [The] custodial account is a trust account where the market operator is trustee and the market operator or trustee has an obligation to see that [the] custodial account is in balance at all times. There is a requirement that as proceeds from the sale are received, they need to be deposited into the custodial account and if there are proceeds not received within a seven-day period following the sale, then it is the

> obligation of the market owner to deposit his own funds into the custodial account to insure that payment will be available to consignors of livestock and the livestock consignors would look [to] the trustee or the market operator as a secondary source of money to be paid, should the buyer default or pay slow for the livestock he has purchased. (Tr. 85-86)

The evidence is clear that the respondent had substantial shortages in its custodial account on December 31, 1985, and July 11, 1986, and failed to make deposits into the account as prescribed under the Act and regulations. Consequently, the respondent violated section 307 of the Act and section 201.42 of the regulations, which constitute unfair and deceptive practices in violation of section 312(a) of the Act.

The financial condition of every market agency must satisfy the solvency requirement of section 204 of the Act (7 U.S.C. § 204), in accordance with the test for solvency set forth in section 203.10 of the regulations (9 C.F.R. § 203.10).

Section 204 of the Act provides, in pertinent part that:

> . . . , the Secretary may require reasonable bonds from every market agency . . . , every packer . . . in connection with its livestock purchasing operations . . . , and every other person operating as a dealer . . . , under such rules and regulations as he may prescribe, to secure the performance of their obligations, and whenever, after due notice and hearing, the Secretary finds any registrant is insolvent or has violated any provisions of this chapter he may issue an order suspending such registrant for a reasonable specified period . . . . (7 U.S.C. § 204).

Section 203.10 of the regulations provides, in pertinent part, that:

> (a). . . , the principal test of insolvency is to determine whether a person's current liabilities exceed his current assets . . . .
>
> * * * * *
>
> (b)(1) "Current assets" means cash and other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business, which is considered to be one year.
>
> (2) "Current liabilities" means obligations whose liquidation is reasonably expected to require the use of existing resources principally classifiable as current assets or the creation of other current liabilities during the one year operating cycle of the business.

* * * * *

> (e) The term current liabilities generally includes: (1) Bank overdrafts (per books); (2) amounts due a custodial account for shippers' proceeds; (3) accounts payable within one year from date of balance sheet; (4) notes payable or portions thereof due and payable within one year from date of balance sheet; . . . . (9 C.F.R. § 203.10).

The financial condition of the respondent must meet the test for solvency in that its current assets must equal or exceed its current liabilities.

The evidence presented conclusively shows that the financial condition of the respondent did not meet the test for solvency on December 31, 1985. The courts consistently hold that the test for solvency as promulgated in section 203.10 of the regulations is a reasonable evaluation of the financial condition of a registrant. *Bowman v. United States Department of Agriculture*, 363 F.2d 81 (1966); *In re: Southern Buyers, Inc.*, 14 Agric. Dec. 811 (1955); *In re: Thumb Auction Markets Inc.*, 37 Agric. Dec. 164 (1977). The respondent's Annual Report as of December 31, 1985, shows current liabilities of $35,144.87 and current assets of $6,893.49, resulting in an excess of current liabilities over current assets of $28,251.38. Mr. Minks testified that he sought to verify the Annual Report figures for current liabilities and current assets during his audit of the respondent's records. However, respondent did not maintain any records of its current assets accounts such as livestock inventory, feed inventory or accounts receivable, from which Mr. Minks could verify the amounts. Mr. Minks' analysis revealed current liabilities of $39,854.36 and gave respondent the benefit of the doubt for its current assets of $6,893.49, resulting in an excess of current liabilities over current assets of $32,960.87. The $4,709.79 difference in the calculation of current liabilities is due to the amount of proceeds receivable shown on the Annual Report which Mr. Minks could not verify with the respondent's records. The respondent did not proffer any evidence to challenge the credibility of Mr. Minks' analysis of its current liabilities. The evidence dispositively shows that as of December 31, 1985, the respondent had current liabilities in excess of current assets, and therefore, its financial condition as of that date did not meet the requirements of section 204 of the Act.

The evidence clearly shows that as of July 11, 1986, the financial condition of the respondent did not meet the requirements of section 204 of the Act. (7 U.S.C. § 204). Mr. Minks testified that he prepared a balance sheet of the respondent's financial condition as of July 11, 1986, which revealed that the respondent had current liabilities of $103,169.55 and current assets of $4,881.31, resulting in current liabilities in excess of current assets of $98,288.24. Mr. Minks' calculation of current assets is based upon oral representations made to him by Dr. White as there were no other records available. Mr. Minks' calculation of current liabilities is based upon his review of the respondent's general account bank statements, general account check stubs, and two promissory notes obtained from the respondent's bank, Citizens

ank of Pierce City, Missouri. Mr. Minks testified that when he
ie notes from the bank, Mr. Jacques, the bank president, informed
he respondent was three months behind in its payments and
vas in default on both notes. Mr. Minks further testified that in
› the information received from Mr. Jacques and the language of
the promissory notes, he classified the notes as current liabilities.
provided the current balances due on the notes which Mr. Minks
s analysis. Mr. Minks discussed the status of the notes with the
t's bookkeeper who confirmed the accuracy of the information.
evidence shows that as of July 11, 1986, respondent had current
n excess of its current assets, and therefore, its financial condition
te did not meet the requirements of section 204 of the Act.
ident's objection to Mr. Minks' classification of the balance due on
as a current liability is without merit. Section 203.10 of the
s clearly states that notes payable, or portions thereof, which are due
le within one year from date of balance sheet are current liabilities.
§ 203.10). The terms of the promissory notes clearly state that:

ult is made in the payment of any installment when due, then all
raining installments shall at the option of the holder become due
yable at once. (Cx 8, 9; Tr. 55, 103)

nt does not deny that it failed to tender the regular monthly
due on the notes. Respondent argues that at the time of Mr.
vestigation the bank had yet to call the balances due on the notes,
fore, the balances should not be classified as current liabilities
the bank gave notice of its intent to call the notes due or actually
notes due prior to Mr. Minks' investigation is not dispositive of the
hat is a current liability for the purpose of preparing a balance sheet
pondent's financial condition. The evidence dispositively shows that
had the right to call the balances due at the time of Mr. Minks'
ion, and could call the balances due within 12 months of the balance
e. Mr. J.L. Phillips, the current vice president of the respondent's
ified that according to the bank's record of the respondent's note
, both notes were in default on July 11, 1986, and that the notes were
allable" at any time, as of July 11, 1986.
onny Parkerson, a certified public account, testified that in
ce with generally accepted accounting principles, Financial
ng Standard No. 78, the total balance of a note which by its terms
alled due by the holder at any time upon default by the maker is
classified as a current liability when such default occurs. Mr.
n further testified that in accordance with Financial Accounting
No. 78, issued by the Financial Accounting Standards Board of the

American Institute of Certified Public Accountants, the total balance due on the notes in this case are properly classified as current liabilities. The plethora of the evidence clearly indicates that Mr. Minks properly classified the balances due on the notes as current liabilities under the regulations.

The respondent's operation of its business while its current liabilities exceeded its current assets is a violation of section 312(a) of the Act. (7 U.S.C. § 213(a)). A market agency found to be insolvent commits an unfair and deceptive practice, in violation of section 312(a) of the Act, if it operates as a market agency notwithstanding its insolvency. (7 U.S.C. § 213(a)). *In re: Victor Koenig*, 24 Agric. Dec. 1213 (1965). The respondent here was insolvent as of December 31, 1985, and July 11, 1986, failing to meet the financial requirements of the Act. In accordance with the holding in *Koenig*, the insolvency of the respondent continued from December 31, 1985, to July 11, 1986, during which time it operated as market agency in commerce. Therefore, the respondent violated section 312(a) of the Act by operating as a market agency while insolvent.

The respondent violated sections 307 and 312(a) of the Act by issuing custodial account checks in purported payment of the net proceeds due to consignors drawn on insufficient funds and thereby failing to pay, when due, the full amount of the proceeds from the sale of consigned livestock. The Judicial Officer consistently has held that the issuance of insufficient funds checks in purported payment is an unfair and deceptive practice in violation of 312(a). *In re: C.J. Edzards*, 37 Agric. Dec. 1880 (1978). Additionally, pursuant to the regulations promulgated by the Secretary, the market agency has the duty to remit the net proceeds from the sale of consigned livestock to the consignor by the close of the next business day following the sale. (9 C.F.R. § 201.43). The respondent here issued custodial account checks which were returned unpaid by the bank in 10 separate transactions. In each transaction, the consignor did not receive payment until 4 to 14 days after the sale. The evidence dispositively shows that the respondent committed unfair and deceptive practices by issuing custodial checks drawn on insufficient funds in purported payment of the proceeds due to consignors and in each transaction failing to remit such proceeds when due. Therefore, the respondent is in violation of sections 307 and 312(a) of the Act.

The contentions of the respondent have been carefully analyzed and have been considered. The respondent would show that it was initially insolvent when it commenced business and throughout the years 1984 and 1985 it sustained losses in excess of $37,000.00 and $49,000.00, respectively, but that for the year 1986 it commenced to break-even. In addition, the respondent would show that it is a "small" market in an area dominated by 2 or 3 larger markets and that the respondent's services to the smaller consignors is of value to the community. In other words the larger markets are not apt to accommodate the small farmer who brings in a small number of animals. Respondent has also indicated through his testimony, that the notes of indebtedness were incurred to enable the market to build a sales barn. The

respondent would controvert that it did anything "willfully." However, the position of the Department is set forth in its published decisions among the more recent of which are: *In re: Rotches Pork Packers, Inc. and David A. Rotches*, Respondents, P.&S. Docket No. 6458 (Apr. 13, 1987) and *In re: Spencer Livestock Commission Co., and Mike Donaldson*, Respondents, P.&S. Docket No. 6254 (Mar. 19, 1987). Under such decisions and other decisions cited therein it is not necessary that the act complained of be done with willful or evil intent.

The respondent's violations of sections 307 and 312((a) of the Act and section 201.42 of the regulations were willful. Violations of the Act and the regulations are held to be willful where the evidence shows that the respondent acted intentionally or with careless disregard of the statutory requirements. *J. A. Speight, et al.*, 33 Agri. Dec. 280, 297 (1974). Dr. White, the president of the respondent testified affirmatively that prior to December of 1985, employees of the respondent discussed the management of its custodial account with the complainant and that he read the Act and the regulations to which the respondent is subject as a market agency registered to sell livestock in commerce on a commission basis. In addition, the respondent received at least two warning letters by certified return receipt from the complainant regarding proper management of the custodial account and the test for solvency with regard to its financial condition. However, notwithstanding the respondent's knowledge of the statutory requirements, respondent violated section 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.42 of the regulations (9 C.F.R. § 201.42), in that it failed to maintain its custodial account, its financial condition did not meet the requirements of the Act, it operated despite its insolvency, it issued insufficient funds checks in purported payment of the net proceeds to consignors, and failed to pay the net proceeds when due from the sale of consigned livestock. Therefore, the evidence clearly shows that the respondent willfully violated the Act and the regulations.

With respect to sanctions, the complainant's witnesses indicated among other things, that they formulated their sanction policy on a basis of the need to administer a national program and that the violations of the respondent constituted unfair and deceptive practices. Such testimony also indicated that the degree of insolvency is not a mitigating circumstance once it had been shown that the respondent operated at a time when its current liabilities exceeded its current assets. It was also indicated in such testimony that the likelihood that a suspension order might result in Sarcoxie Community Sales, Inc. going out of business was of little moment and not worthy of consideration by the complainant.

Although mindful of the Judicial Officer's decision, the Administrative Law Judge is issuing an Order, of less severity as to suspension than the one

proposed by complainant (28 days) based upon the record as a whole and the contentions of respondent.

As noted by respondent, Mr. Paulsen testified that he recommended a four-week suspension of respondent with a cease and desist order. However, Mr. Paulsen further testified that he had the authority to settle the matter before hearing and *that he would have accepted a two-week suspension had it been proposed by respondent*. The respondent was unaware of this.

Counsel for respondent submitted that he vigorously pursued settlement, strongly requesting from counsel for complainant a proposal for *any sanction* that complainant would accept instead of a four-week suspension. Respondent pursued this because, as testified to at hearing by Dr. White, a four-week suspension and the adverse publicity attendant thereto would put respondent out of business. Respondent would have accepted a two-week suspension and a cease and desist order, even in the face of adverse publicity and the risk of going out of business. However, counsel for respondent asserts that counsel for complainant informed counsel for respondent that complainant would accept nothing less than a four-week suspension. Mr. Paulsen testified that he was never informed by his counsel that respondent had asked for an alternative to a four-week suspension.

The chief evil at which the Packers and Stockyards Act is aimed is the monopolization of the packing and stockyards industry, which allows packers and stockyards to unduly and arbitrarily lower prices to shippers who sell, and unduly and arbitrarily increase prices to customers who buy. *Mahon v. Stowers*, 416 U.S. 100, 94 Sup. Ct. 1626, 402 Ed.2d 79, *on remand*, 510 F.2d 139, *rev'd* 526 F.2d 1238, *cert. denied*, 429 U.S. 834, 97 Sup. Ct. 98, 50 L. Ed.2d 99 (1974).

Dr. White's testimony at hearing, which was uncontroverted by complainant, was that in the Southwest Missouri stockyards market respondent Sarcoxie Community Sales, Inc., holds a mere four percent of the market. Dr. White further testified that he organized respondent based upon his experience as a stockyard veterinarian, and that respondent began operations on January 7, 1984, trying to break into the market dominated by the three large stockyards at Joplin, Diamond and Springfield. In beginning this business Dr. White hoped to provide to area farmers a regular Saturday sale and a sale that would be organized and operated especially to accommodate the small farmer. Sarcoxie became the only market in the area catering to the small farmer.

Dr. White further testified that the sales barn was a family business, owned by himself and his wife and his two adult sons, along with a fifth party, and in which he served as veterinarian. His wife worked in the office, and his two sons worked in the field and ring.

Dr. White further testified that in its first year, 1984, the business had for taxable income a loss of $37,651.00; in its second year, 1985, had a loss of $49,547.00; in 1986 had a break-even year of a loss of $197.00; and expected future years to show positive income. He further testified that Sarcoxie

Community Sales, Inc., was the third biggest employer in the Sarcoxie, Eastern Jasper County and Western Lawrence County, Missouri, area by number of employees, and that he believed Sarcoxie Community Sales, Inc., is important to that area and community.

The respondent argues that if the Packers and Stockyards Act was designed to fight monopolization in the packing and stockyard industry, then complainant is after the wrong people. "Not only are they pursuing the newest and smallest stockyards in the market, they are also pursuing the only market that caters to the small farmer with small lots of cattle to sell. There was also testimony that the adverse publicity from the filing of this action severely damaged respondent's business and that a four-week sanction and the publicity thereupon would put respondent out of business. Complainant therefore, in pursuing this matter and seeking enforcement of its sanction, is attempting to aid and ratify the monopolization of the stockyards market in Southwest Missouri."

There has been no showing that the following order is not justified by a consideration of the record as a whole.

Order

The respondent, Sarcoxie Community Sales, Inc., its officers, directors, agents, employees, successors, and assigns, directly or through any corporate device, shall cease and desist from:

(1) Engaging in business subject to the Act while its current liabilities exceed its current assets;

(2) Failing to deposit in its Custodial Account for Shippers' Proceeds, within the time prescribed in section 201.42 of the regulations, (9 C.F.R. § 201.42), amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;

(3 Failing to otherwise maintain its Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 C.F.R. § 201.42);

(4) Issuing checks to consignors of livestock in payment of the net proceeds due from the sale of their livestock without having sufficient funds on deposit and available in the account upon which they are drawn to pay such checks when presented; and,

(5) Failing to remit to consignors of livestock, when due, the net proceeds due from the sale of their livestock.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in its business subject to the Packers and Stockyards Act, including, but not limited to, (1) a general ledger of accounts showing assets, liabilities, income, expenses and net worth; (2) livestock inventory records; (3) market support records sufficient to trace livestock from purchase to disposition.

Respondent Sarcoxie Community Sales, Inc., is suspended as a registrant under the Act for a period of fourteen (14) days and thereafter until such time as it demonstrates that it is solvent and that the shortage in its Custodial Account for Shippers' Proceeds has been eliminated. When respondent demonstrates that it is solvent and that the deficit in its custodial account has been eliminated, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the fourteen (14) day period.

This Decision and Order will become final Thirty-five (35) days after service hereof unless appeal therefrom is made within Thirty (30) days as provided for under the Rules of Practice and Procedure (7 C.F.R. 1.131 *et seq.*).

All motions and requests of the parties have been considered and to the extent if any, said motions or requests are inconsistent with this Decision and Order, they are hereby denied.

Copies hereof shall be served upon the parties.

[This decision and order became final August 22, 1988.--Editor.]

In re: WESTERN STATES CATTLE COMPANY, TOM M. CROWL, GARY D. DeHAAN, and MERRITT BROWN.
P&S Docket No. 6592.
Order filed August 2, 1988.

Dennis, Becker, for Complainant
David E Vohs, Sioux City, Iowa, for Respondents
Amended Stay Order issued by Donald A Campbell, Judicial Officer

AMENDED STAY ORDER

The attorney for respondents has requested a stay of the suspension provisions previously issued in this case pending the outcome of proceedings for judicial review. The suspension and prohibition provisions of the order issued herein are stayed pending the outcome of the appeal.

The cease and desist and recordkeeping provisions of the order shall remain in effect.

ROBERT W. BUTTERFIELD, and BARTONS LAND & LIVESTOCK, INC. v. GENE GLIGOREA.
P&S Docket No. 6859.
Order of Dismissal filed August 16, 1988.

John J. Casey, Presiding Officer
Complainant, pro se.
Respondent, pro se.
Order of Dismissal issued by Donald A Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended, 7 USC 181 *et seq.*, begun by two complaints, one received on August 2, 1986, the other received on August 13, alleging in substance breach of an express warranty in the sale of certain sheep. The amounts claimed were, for complainant Butterfield $5,841.00, for complainant Bartons $5,235.50.

Copies of the complaints, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding under the Rules of Practice, were served on respondent on December 8, 1986. A copy of the investigation report was served on each complainant on December 9. An answer and request for oral hearing was received from respondent on February 18, 1987 after an extension of time. A copy thereof was served on complainant Barton on February 28, and on complainant Butterfield on March 2. A reply was received from complainant Butterfield on March 17.

An oral hearing as requested was held on July 29, 1987 in Gillette, Wyoming before John J. Casey of the Office of the General Counsel of this Department. No party was represented by counsel. Complainant Butterfield, respondent, and four witnesses testified. One exhibit was received. No brief was received.

It is undisputed that on Monday, March 31, 1986 respondent sold certain sheep to complainants with an express warranty of some sort, that complainants' first contact of respondent after the sale was about June 1, and that no adjustment was made. Incidentally, although the parties spoke of a "guarantee," the record shows clearly that they were referring to what the law calls an express warranty. See AmJur2d *Sales* §691.

We conclude that each complaint was not received within 90 days of accrual of the cause of action, so we are without jurisdiction to order reparation on it. The basis for this is that the cause of action arose upon completion of shearing of the sheep in April, 1986, as explained hereinafter, and neither complaint was received by the Department till the following August.

The dispute is about the terms of the express warranty. Complainants contended that respondent agreed to pay damages for any sheep which were

and neither complaint was received by the Department till the following August.

The dispute is about the terms of the express warranty. Complainants contended that respondent agreed to pay damages for any sheep which were found not to have been bred or not to "have good bags." Respondent denied this. He contended that, on the day complainants first saw the sheep, he only told them that they could reject any they wanted to at the time of delivery. He also contended that, on the day of delivery, he told complainants that they could later exchange sheep for others owned by the sellers.

Respondent also contended that such an exchange would have been made if complainants had contacted him earlier than they did, but the sellers sold the sheep only because they were forced out of the sheep business by their lender and, by the time of complainants' first contact of him after the sale, about two months later, such an exchange had been made impossible by certain other litigation.

Testimony introduced by complainants shows that respondent agreed to an express warranty, which was not in dispute, but does not show the terms of that warranty, as shown below. An express warranty is contractual, created during the bargaining process. AmJur2d *Sales* §690. There is not only one kind. A seller, of livestock or anything else, who agrees to an express warranty might assume a liability to be determined up to two months later, but does not necessarily do so. An express warranty of livestock can amount to an agreement only to permit rejection of some at the time of delivery, or an agreement only to permit a substitution shortly after delivery. That part of the record shows only that the parties agreed upon an express warranty, but that each side had a different idea in mind about its terms. A buyer has the burden of proving the existence of the warranty relied upon. AmJur2d *Sales* §705.

The following testimony was received:

> [Mr. Butterfield, Tr. 5] My wife asked him [respondent] at least three different times if we decided to buy these sheep would he guarantee that they were bred and good bags, which he did.
>
> [Mr. Barton, Tr. 34-5] * * * Mrs. Butterfield asked Mr. Gligorea if -- she said, "Now, you're guaranteeing these good bags, good mouth, and bred," and she put it just that way.
>
> And he said, "Well, yes, I will. And," he said, "I went through these sheep personally two weeks ago" -- this would be -- if this was on March 27th, that would have been two weeks prior to that -- "and helped them work the sheep and we took 600 head of bad sheep off of these, bad bags, bad mouths, bad eyes, whatever."
>
> [Mr. Jespersen, son-in-law of Mr. Barton, who received and took care of the Barton sheep, Tr. 44] Finally she [Mrs. Butterfield] said, "Are you going to guarantee the sheep?" And he [respondent] said, "I will

guarantee the sheep. I worked them, I know they're a good, honest bunch of sheep."

[Mr. Jespersen, Tr. 56] * * * Diane [Butterfield] badgered Mr. Gligorea to the point of being really humorous about dries and bad bags. And I -- I don't know how -- I don't know how a man can make that kind of a guarantee, other than on the bag.

But he said, "These are an honest bunch of sheep and we'll stand behind them." And Diane said, "Well, then, you will guarantee the dries and bad bags?" And he said, "Yes, I'll guarantee them."

[Mrs. Jespersen, Tr. 59] And finally -- or he [respondent] would say, "They're a good, honest band of sheep." And finally Diane said, "Are you going to guarantee these sheep?" And he said, "Yes, I will."

[Mrs. Butterfield, Tr. 63] * * * We asked him to put them in the corral so we could get a good look at these up close, and he said no, there would be no point in doing this because these sheep had already been worked.

So, as a rule, I don't think we would buy sheep under those conditions. I like to see what I'm buying. And he -- I asked him -- because of this, I asked him -- I said, "Would you -- if we take these sheep, would you guarantee that -- any dries or any bad bags?" And he said yes.

[Mr. Gligorea, Tr. 80-1, about the day complainants first saw the sheep] We got out there and Mr. Butterfield asked me if we could corral the ewes because they were -- they were in the herd and they were scattered over about a mile, which is nothing when you're herding sheep. And I said I didn't think it would be a good idea, the ewes had been jammed around, and I said I don't think that the -- that Chuck Lawrence [seller] would appreciate us corralling his ewes to begin with. And I said -- besides that, I said, the ewes have been worked.

And I said that if there was anything that they -- they -- if they bought the ewes, if there was anything that they didn't like they could take them out at the time they received them.

[Mr. Gligorea, Tr. 83-4, about the day of delivery] They [complainants] asked if -- they again said, "Well, boy, we can't afford to buy sheep that won't have lambs," and I said, "Well, maybe Chuck --" Chuck [the seller] had some older ewes that he was lambing out.

And I went to Chuck and I said, "Chuck, if there's any way these guys -- would you trade these boys an old ewe and lamb for some of these young ewes if they're -- if they don't have lambs?" And Chuck said, "Yes" -- he said -- "I would." I said fine.

"Because," he said, "I --" he was -- he wanted to stay in the sheep business. He didn't want to get out. He wanted to stay in the sheep business. He said, "I'd just as soon have the young ewes because" -- he said -- "then I'm still in the sheep business but these old ewes I'll have to get rid of them anyway."

* * *

And then I went and talked to Mr. Barton and Butterfield about it and we discussed it and they thought it wouldn't be too bad a deal.

[Mr. Gligorea, Tr. 104, on cross-examination by Mr. Barton] Q. Did -- did you recall at any time -- did you ever mention to either Mr. Butterfield or myself that Mr. Lawrence had agreed to take any sheep back?

A. When we were loading the ewes is when this came up, and I said -- and I went and talked to Chuck Lawrence and I went back and told -- told the both of you at the time that Chuck thought that it was -- it would be a good deal because he'd get the young ewes back and you would get old ewes. Even if they had a lamb at their side, he thought more of keeping the young ewes than he did of getting rid of the old ewes.

PRESIDING OFFICER: Is it your testimony that you told them that?

A. Yes, sir, I did.

[Mr. Gligorea, Tr. 107, on cross-examination by Mrs. Butterfield] Q. Did not my husband, when I asked you -- did I not ask you if you would guarantee the bags and the dries on this herd of sheep?

And you told me that you would.

Did you not say this?

A. No, I did not say that as such.

While the testimony does not show the terms of the express warranty, the evidence of the circumstances in which it was discussed shows that the terms were to permit an exchange if requested by complainants upon completion of shearing of the sheep, as discussed below.

A few days before the sale, before any agreement was reached, the parties met where the sheep were then pastured. Complainants wanted ewes for breeding, and wanted to inspect the sheep closely, but had no opportunity to do so and could only view them in the pasture; they were not corralled or penned.

Respondent and others had inspected the sheep, and culled some, shortly before complainants first saw them, and respondent informed complainants

of this, telling them that he and others had "worked the sheep." Also, the sheep were "in their full wool" and due for shearing then, and complainants planned to shear them shortly after the sale and so informed respondent.

There was credible testimony that it is always difficult if not impossible to determine whether sheep are bred and "have good bags" before lambing, that this is particularly difficult upon merely viewing them in a pasture without a close inspection, and that it was more difficult than usual in the case of these sheep because they were "in their full wool" and due for shearing at the time. Thus, completion of the shearing was when the close inspection which complainants wanted to make before the sale, but was then impossible, became possible.

There was some conflict in the testimony as to the time of completion of the shearing. Messrs. Butterfield and Barton testified about it (Tr. 13, 37) but seemed uncertain as to whether it was in April or May. Mr. Jespersen testified (Tr. 47-8) that the Barton sheep were sheared April 20-1. Mrs. Butterfield testified (Tr. 64-5) that the Butterfield sheep were sheared in April. Mr. Jespersen and Mrs. Butterfield seemed more certain about the time of the shearing than Messrs. Butterfield and Barton. All were credible witnesses, in the judgment of the presiding officer.

It is undisputed that the parties had some discussion about obtaining the opinion of a certain disinterested party as to what would be a fair resolution of the dispute. The record contains the recommendation of the other party. Respondent contended that the parties agreed to submit the matter for binding arbitration. Complainants contended that they agreed only to obtain the opinion of the other party. The testimony on this issue is in direct conflict and irreconcilable. We disregard that recommendation on the basis that it is undisputed that the recommendation is based only on what the complainants told the other party, and the record does not contain sufficient basis for a finding of an agreement for binding arbitration.

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR §2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 USC 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 USC, 1982 Ed., App. pg. 1068.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR §202.117.

On a complainant's right to judicial review of such an order, see 5 USC 702-3 and *United States v. I.C.C.*, 337 US 426.

The complaints herein are hereby dismissed.

MARSHALL LIVESTOCK AUCTION, INC. v. ROBERT F. JOHNSON.
P&S Docket No. R 88-13.
Decision and Order filed August 3, 1988.

Failure to file an answer--Failure to make full payment promptly.

Edward M. Silverstein, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding brought pursuant to the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*). A timely complaint was filed, on April 13, 1988, in which the complainant alleged that the respondent had failed to make full and timely payment for livestock purchases made at its stockyard during the period January 9-23, 1988. Copies of the complaint and report of investigation, prepared by the Packers & Stockyards Administration of the Department and filed in this proceeding in accordance with Rule 4 of the Rules of Practice Governing Proceedings Under the Packers and Stockyards Act Reparation Proceedings, 9 C.F.R. § 202.104, were served upon respondent. A copy of the report of investigation also was served upon complainant. As respondent has failed to file an answer to the complaint filed against him, the issuance of a decision without further procedure is appropriate pursuant to Rule 6 of the Rules of Practice, 9 C.F.R. § 202.106.

Complainant, Marshall Livestock Auction, Inc., is a corporation whose mailing address is RFD 5, Box 644, Marshall, Missouri 65340. It operates a posted stockyard also at Marshall, Missouri. Respondent, Robert F. Johnson, is an individual whose mailing address is P.O. Box 101, Martinsburg, Missouri 65264. He is registered with the Packers and Stockyards Administration as a market agency, buying on commission, and as a dealer.

On January 9, 1988, respondent purchased 145 cattle at complainant's stockyard for a total of $64,673.77, and paid for them with a check which was returned to complainant by respondent's bank because he did not have sufficient funds on hand to make payment;[1] on January 16, 1988, respondent purchased 160 cattle at complainant's stockyard for a total of $69,826.67, and paid for them with a check which was returned to complainant by respondent's bank because he did not have sufficient funds on hand to make payment; and, on January 23, 1988, respondent purchased 75 cattle at complainant's stockyard for a total of $28,422.13, and paid for them a check

[1] There is some question as to whether the complaint with respect to this transaction was filed timely. However, if the respondent's payments to complainant are first applied against the oldest debts, complainant already has received full payment for this transaction. Accordingly, we do not need to reach the issue of whether the complaint was timely as to it.

which was returned to complainant by respondent's bank because he did not have sufficient funds on hand to make payment. Subsequent thereto, respondent did make partial payment to complainant in the total amount of $111,103.08. Applying this amount to respondent's total purchases on the three days in question of $162,922.57 leaves a balance due complainant from respondent of $51,819.49. Respondent's failure to pay complainant this amount constitutes an unfair and unjust practice in violation of the Act for which reparation plus interest may be awarded.

On failure to pay in full for livestock purchased as an unfair or unjust practice within the meaning of the Act, *see* section 409 of the Act, 7 U.S.C. § 228b, and *Vance v. Reed*, 495 F. Supp. 852, 39 Agric. Dec. 1117 (MD Tenn. 1980).

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 C.F.R. § 2.35, as authorized by the Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. *See* also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 Ed., Appendix, pg. 764. It constitutes "an order for the payment of money" within the meaning of section 309(f) of the Act, 7 U.S.C. § 210(f), which provides for enforcement of such an order by court action.

It is requested that copies of all pleadings filed by any party in any such suit be filed with the Hearing Clerk, United States Department of Agriculture, Room 1079 SOAGRICBG, Washington, D.C. 20250, for inclusion in the file on this proceeding. Further, it is requested that, if the construction of the Act or the jurisdiction to issue this order become an issue in any such suit, notice of such fact shall be given to the Office of the General Counsel, United States Department of Agriculture, Room 2446 SOAGRICBG, Washington, D.C. 20250-1400.

On petition to set aside a default, *see* Rule 17 of the Rules of Practice, 9 C.F.R. § 202.117.

On respondent's right to judicial review of this order, *see Maly Livestock Commission v. Hardin et al.*, 446 F.2d 4, 30 Agric. Dec. 1063 (8th Cir. 1971), and *Fort Scott Sale Co., Inc. v. Hardy*, 570 F. Supp. 1144 (D. Kans. 1983).

Order

Within thirty days from the date of this order, respondent shall pay complainant $51,819.49, as reparation, plus interest at the rate of 13 percent per annum from February 1, 1988, until paid.

Copies of this order shall be served upon the parties.

CHARLES SHOEMAKER, WELLS RANCH, INC., and LESTER WELLS v. ERICSON LIVESTOCK MARKET, INC., and RONALD E. WILSON.
P&S Docket No. 6931.
Order filed August 3, 1988.

Peter V. Train, Presiding Officer.
Richard A. Koehler, Geneva, Nebraska, for Complainants.
Warren Arganbright, Valentine, Nebraska, for Respondents.
Order issued by Peter V Train, Presiding Officer.

STAY OF PROCEEDINGS AGAINST RONALD E. WILSON

It appears from the notice filed by Mr. Koehler, counsel for complainants, that respondent Ronald Wilson has filed a petition for relief under Chapter 7 of the Bankruptcy Code. The complaint against Mr. Wilson and the cross-claim filed by Ericson Livestock Market, Inc., against Mr. Wilson are therefore stayed under 11 U.S.C. § 362(a).

Copies of this order shall be served upon the parties.

RICHARD E. LYNG, Plaintiff v. A. PELLEGRINO & SONS, INC., et al., Defendants.
Civ. A. No. 86-1534-C.
Decided August 30, 1988.

PACA statutory trust--Secretary may recover trust assets of a broker transferred to stockholders to prevent dissipation of the trust.

Peter E. Gelhaar, Asst. U S. Atty., Boston, Mass., for plaintiff.
Alan M. Spiro, Friedman & Atherton, Boston, Mass., for defendants Peter Karger and Melon Produce, Inc
Richard S Hackel, Monheimer and Hackel, Boston, Mass , for defendant Brunswick Finance Corp.

U.S. DISTRICT COURT, D. MASSACHUSETTS

Secretary of Department of Agriculture brought action under Perishable Agricultural Commodities Act seeking to recover payments made by broker to its shareholder. The District Court, Caffrey, Senior District Judge, held that by virtue of his authority under Perishable Agricultural Commodities Act to prevent dissipation of assets in trust in hands of dealers, merchants and brokers, Secretary of Agriculture was entitled to recover assets which were transferred by broker to broker's shareholder.

So ordered.

Factors

By virtue of his authority under Perishable Agricultural Commodities Act to prevent dissipation of assets in trust in hands of dealers, merchants and brokers, Secretary of Agriculture was entitled to recover assets which were transferred by broker to broker's shareholder. Perishable Agricultural Commodities Act, 1930 §§ 1 et seq., 5, 7 U.S.C.A. §§ 499a et seq., 499e.

MEMORANDUM

CAFFREY, Senior District Judge.

Plaintiff Richard E. Lyng, as Secretary of the Department of Agriculture, has brought this action under section 5 of the Perishable Agricultural Commodities Act, (PACA), 7 U.S.C. § 499e. Section 5 of PACA was enacted to insure that produce growers are paid for the produce they sell to dealers merchants and brokers. To achieve this goal, PACA imposes a trust for the benefit of unpaid sellers on produce and produce-related assets held by produce merchants, dealers and brokers. This trust continues until the suppliers are paid. 7 U.S.C. § 499e. An unpaid seller perfects his interest in

the trust by filing a timely notice of his claim with the Secretary and with the debtor-broker. 7 U.S.C. 499e.

PACA authorizes the Secretary to prevent dissipation of the assets in a trust by bringing suit against a broker in the U.S. District Courts. In addition, the Secretary may bring an action to recover trust assets which have been transferred to a third party. *See In re G & L Packing Co.*, 41 B.R. 903, 915 (N.D.N.Y.1984); *Matter of Harmon*, 11 B.R. 162, 166 (Bankr.N.D.Tex.1980).

In the present case, the Secretary has offered evidence that defendant A. Pellegrino & Sons, Inc. purchased and failed to pay for $158,468.63 worth of produce from six Arizona shippers. At least two of the shippers preserved their claims to the trust assets by filing the appropriate notices in a timely fashion.[1] The plaintiff also offered evidence that during the period in which the trust was in effect the corporation made payments totalling $10,000 to its shareholder, Joseph Pellegrino, the sole remaining defendant herein. It is these payments that the Secretary now seeks to recover.

The Secretary moved for summary judgment against defendant Joseph Pellegrino on May 27, 1988. The defendant has filed no opposition to the motion and there is therefore no genuine issue of fact. By virtue of his authority to prevent dissipation of the assets of a PACA Trust, the Secretary is entitled to recover trust assets which are transferred to stockholders. For these reasons, summary judgment will be granted in favor of the plaintiff.

Order accordingly.

MARVIN PROPERTIES, INC. dba CUT & READY FOODS, Debtor. CONSOLIDATED MARKETING, INC., Appellant v. MARVIN PROPERTIES, INC., dba CUT & READY FOODS; BANK OF CALIFORNIA, Appellees.
No. 87-2488.
Decided August 19, 1988.

PACA statutory trust--Seller must give written notice directly to buyer of its intent to preserve trust benefits.

Under the trust provisions of the PACA, the seller will lose trust benefits unless the seller gives written notice directly to the buyer of its intent to preserve trust benefits. Whether USDA acted as seller's agent by giving notice to the buyer was not decided as the theory of agency was not raised before the bankruptcy court, but was first raised during oral argument before the BAP. BAP acted within its discretion in refusing to reach agency issue.

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[1] The claims of these two shippers totalled over $48,000.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Before BROWNING, ALARCON and NORRIS, Circuit Judges.

ALARCON, Circuit Judge:

In this adversary proceeding in bankruptcy, plaintiff-appellant Consolidated Marketing, Inc. (Consolidated) appeals from a Bankruptcy Appellate Panel (BAP) decision affirming a bankruptcy court order denying its motion for summary judgment and granting summary judgment for defendant-appellee Bank of California (BankCal). Consolidated contends that the bankruptcy court erred when it found that Consolidated had not given adequate notice to Marvin Properties, Inc., dba Cut & Ready Foods (debtor), to perfect a statutory trust under the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. § 499e(c)(3) (Supp. III 1985).

We must decide whether section 499e(c)(3) requires that a seller give notice to a buyer directly in order to perfect a statutory trust.

I

The facts in this case are undisputed Consolidated sells perishable commodities. At issue in this action are commodities Consolidated sold to the debtor on credit between December 10, 1985 and February 4, 1986. The debtor failed to pay for the goods in a timely manner. After the debtor failed to pay, Consolidated sought to obtain a PACA statutory trust on the proceeds from the sale of the perishable commodities.

It is undisputed hat (1) Consolidated filed a notice of its intent to preserve PACA trust benefits with the Secretary of Agriculture (Secretary), United States Department of Agriculture (USDA), (2) that Consolidated did not send a similar notice to the debtor, (3) that the USDA sent a letter to Consolidated acknowledging receipt of the notice and sent a copy of the letter to Consolidated to the debtor, and (4) that the debtor had actual knowledge that Consolidated had filed a notice of intent to preserve PACA trust benefits with the Secretary. There is a question as to whether the debtor ever received a copy of the actual letter Consolidated sent to the Secretary. Consolidated states that it is "undisputed that the debtor received [Consolidated's] written notice of intent to preserve trust assets from the Department of Agriculture." BankCal contends that "[t]his is inaccurate. The Department of Agriculture sent the Debtor only *a copy of the letter to Consolidated*, which letter acknowledges receipt of the notice of intent." (Emphasis in original).

On February 13, 1986, the debtor filed for relief under Chapter 11 of the Bankruptcy Code, BankCal, who had a perfected secured interest in the debtor's inventory and proceeds, obtained an order from the bankruptcy court granting relief from the automatic stay and allowing it to foreclose upon its security interest in the debtor's inventory, which included property Consolidated claimed as belonging to its PACA trust.

On May 27, 1986, Consolidated filed a complaint in bankruptcy court, initiating an adversary proceeding seeking to enforce a PACA statutory trust. Consolidated named the debtor, Robert Crane, vice-president of debtor, Marvin Feinstein, president of debtor, and BankCal. BankCal was included because it was a secured creditor of the debtor and had possession of the property Consolidated sought for the trust, the debtor's inventory and proceeds. BankCal answered the complaint on July 7, 1986.

On August 8, 1986, Consolidated filed a motion for summary judgment. In its motion, Consolidated argued that it had fulfilled the requirements in PACA, 7 U.S.C. § 499e(c)(3), necessary to establish a statutory trust, and thus, was entitled to the property in the possession of BankCal that belonged in the trust. Consolidated claimed that the property in a PACA trust is not part of the debtor's estate but is "for the sole benefit of the unpaid seller."

On August 19, 1986, BankCal filed its opposition to the motion for summary judgment. BankCal argued that Consolidated failed to show that it sent written notice of its intent to establish a PACA trust to the debtor. According to BankCal, Consolidated's "failure to comply with the regulations was fatal to its claim to benefits under the trust." Because Consolidated had not met its burden of making a prima facie case, BankCal argued, summary judgment for Consolidated would be improper.

On August 23, 1986, the debtor filed a statement that it would file no opposition to the motion for summary judgment.

On October 20, 1986, the bankruptcy court heard argument on Consolidated's motion and requested simultaneous supplemental briefing on the issue of the type of notice required to preserve a trust under PACA. On January 8, 1987, the bankruptcy court denied Consolidated's motion for summary judgment and *sua sponte* granted summary judgment in favor of BankCal finding that PACA requires that Consolidated give written notice directly to the debtor in order to preserve a PACA trust. Consolidated appealed the bankruptcy court decision to the BAP. On July 17, 1987, the BAP affirmed the bankruptcy court's decision. *In re Marvin Properties, Inc.*, 76 B.R. 150 (9th Cir. BAP 1987). Consolidated appeals this decision.

II

This court "review[s] de novo the bankruptcy court's grant of summary judgment." *In re Center Wholesale, Inc.*, 788 F.2d 541, 542 (9th Cir. 1986) (citing *In re Daley*, 776 F.2d 834, 836 (9th Cir. 1985), *cert. denied*, 476 U.S. 1159, 106 S.Ct. 2279, 90 L.Ed.2d 721 (1986)).

Section 499e(c)(3) of PACA establishes a procedure whereby a seller of perishable commodities can establish a trust for its own benefit on the commodities it sold on credit and on any proceeds of the buyer from subsequent sale of those proceeds. Section 499e(c)(3) states in pertinent part:

> The unpaid supplier, seller or agent shall lose the benefits of such trust unless such person has given written notice of intent to preserve the

> benefits of the trust to the commission merchant, dealer, or broker and has filed such notice with the Secretary [of Agriculture]. . . .

The bankruptcy court interpreted this provision "to require the seller to send written notice directly to both the debtor and the Secretary in all instances."

In its opening brief, Consolidated argues that the USDA's regulations implementing section 499e(c) and the legislative history of PACA show that section 499e(c) "merely require[s] that written notice be given to the debtor. There is no requirement that the unpaid seller must be the entity to give the written notice. Therefore, the trust was properly perfected when the debtor received the written notice in a timely manner."

No case has answered the question presented in this action: Whether section 499e(c)(3) requires that written notice be given by the seller directly to the buyer, or whether the notice requirement is satisfied as long as the buyer receives *actual* notice, no matter who gives it to it.

> The Supreme Court has held that [l]egislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must be ordinarily regarded as conclusive.'"

Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n, ___ U.S. ___, 107 S.Ct. 1855, 1860, 95 L.Ed.2d 404 (1987) (quoting *United States v. James*, 478 U.S. 597, 606, 106 S.Ct. 3116, 3122, 92 L.Ed.2d 483 (1986), in turn quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980)). *Accord Foxgord v. Hischemoeller*, 820 F.2d 1030, 1032 (9th Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 503, 98 L.Ed.2d 502 (1987). If the terms of a statute are unambiguous, judicial inquiry is complete "unless exceptional circumstances dictate otherwise. . . ." *Burlington Northern*, 107 S.Ct. at 1860 (citing *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981)).

The language of section 499e(c)(3) is unambiguous on its face. It clearly states that the seller shall lose the trust benefits unless "*such person* has given written notice of intent to preserve benefits of the trust to the commission merchant, dealer, or broker and has filed such notice with the Secretary. . . ." (Emphasis added). The statute clearly requires the seller to given written notice directly to the buyer.

III

Consolidated argues that even if section 499e(c)(3) requires that Consolidated give written notice to the debtor directly, the USDA acted as Consolidated's agent and gave notice to the debtor sufficient to fulfill the

statutory requirements. The BAP held that "Consolidated admits that this argument is raised for the first time on appeal. . . ." The BAP declined to review the issue for the first time on appeal.

Consolidated contends that the BAP erred when it ruled that the agency issue was raised for the first time on appeal. Consolidated makes the argument in its brief that the Affidavit of Harriet Morgan attached to the Reply Memorandum of Points and Authorities in Support of the Motion for Summary Judgment, in addition to the two letters written by the USDA and attached to the affidavit, "demonstrates that the Secretary of the Department of Agriculture was acting as the agent of the . . . seller." Consolidated argues that this is sufficient to show that the issue was raised before the bankruptcy court. . . .

The theory of agency was not advanced or suggested to the bankruptcy court. The affidavit and the letters were presented in response to an argument raised in BankCal's opposition to the summary judgment motion that Consolidated had not shown that the debtor had received notice of Consolidated's intent to preserve the trust benefits. Neither the affidavit nor the letters referred to the USDA as Consolidated's agent. In addition, the argument was not made in any other paper presented to the bankruptcy court that the USDA acted as Consolidated's agent. Finally, the issue of agency was not asserted in Consolidated's briefs before the BAP. From the record, it is clear that agency was first raised during oral argument before the BAP.

This court reviews an intermediate court's decision whether to consider issues not presented to the bankruptcy court for an abuse of discretion. *See Matter of Pizza of Hawaii, Inc.*, 761 F.2d 1374, 1377 (9th Cir. 1985) ("it is within the district court's discretion whether to consider issues not presented to the bankruptcy court"). The BAP did not abuse its discretion in refusing to address an issue raised for the first time during oral argument.

The fact that the BAP acted within its discretion in refusing to reach the agency issue does not resolve the question whether we should address it. An appellate court will decline to review an issue not properly raised below unless it is necessary to prevent a manifest injustice. *In re Rylher*, 799 F.2d 1412, 1414 (9th Cir. 1986). "Where a party fails to provide a reason for its failure to raise an issue in the trial court, there is no manifest injustice in refusing to review the issue." *Id.* "This court may dispense with the waiver rule when 'the question is a purely legal one that is both central to the case and important to the public.'" *Abex Corp. v. Ski's Enterprises, Inc.*, 748 F.2d 513, 516 (9th Cir. 1984) (quoting *In re Sells*, 719 F.2d 985, 990 (9th Cir. 1983)).

Consolidated argues that the agency question is a purely legal issue and therefore can be decided for the first time on appeal. We do not agree. Whether an agency relationship exists requires findings of facts to show the nature of the relationship between the parties. We also decline to address this issue for the first time in this appeal.

AFFIRMED.

In re: McALLEN PRODUCE COMPANY, a/t/a McALLEN PRODUCE COMPANY, INC.
PACA Docket No. D 88-508.
Decision and Order filed June 20, 1988.

Failure to make prompt payment--Failure to maintain sufficient assets in trust--Failure to file answer.

Andrew Y Stanton, for Complainant
Respondent, pro se
Decision and Order issued by Edward H. McGrail, Administrative Law Judge

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on November 18, 1987, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period November 1985 through September 1986, respondent purchased, received, and accepted, in interstate and foreign commerce, from 37 sellers, 88 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $197,972.22. It is also alleged that respondent has failed to maintain sufficient assets in trust.

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were sent certified mail to respondent's "last known" address on November 27, 1987, but were returned marked "moved - left no address." In accordance with the Rules of Practice (7 C.F.R. § 1.147(b)), the complaint was sent by regular mail on December 2, 1987 This mailing was also returned "moved - left no address." Therefore, in accordance with the Rules of Practice, the respondent was properly served. *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986).

An answer was mistakenly filed on January 6, 1988, by parties responding only as "alleged responsible parties." However, upon realizing that they had no authority to answer the complaint issued against the respondent, their motion to strike the answer was orally granted. The matter of "alleged responsible parties" is one which will be referred to the proper agency for consideration in a separate informal hearing.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice (7 C.F.R. § 1.136) and is therefore in default. Upon motion of the complainant for issuance of a Default Order, the following Decision

and Order is issued without further investigation or hearing pursuant to § 1.139 of the Rules of Practice (7 C.F.R. 1.139).[1]

Findings of Fact

1. Respondent, McAllen Produce Company, a/t/a McAllen Produce Company, Inc., is a corporation, whose address is 201 N. 34th, McAllen, Texas.

2. Pursuant to the licensing provisions of the Act, license number 851017 was issued to respondent on April 17, 1985. This license was renewed annually, but terminated on April 17, 1987, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period November 1985 through September 1986, respondent purchased, received, and accepted in interstate and foreign commerce, from 37 sellers, 88 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $197,972.22.

4. As is more fully set forth in paragraph 6 of the complaint, respondent, by failing to make full payment promptly for produce, as set forth in Finding of Fact 3 herein, failed to maintain sufficient assets in trust as required by section 5(c) of the Act (7 U.S.C. § 499e(c)).

Conclusions

Respondent's failure to make full payment promptly with respect to the 88 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the following Order is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final August 17, 1988.--Editor].

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[1] Complainant's original Decision and Order has been amended by the undersigned.

AMCLO INTERNATIONAL MARKETING 82, INC. v. DENNIS PRODUCE SALES, INC.
PACA Docket No. 2-7401.
Decision and Order filed August 9, 1988.

Dennis Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant $555.70 with interest thereon at the rate of 13 percent per annum from May 1, 1986, until paid.

Copies of this order shall be served upon the parties.

ANTIGO POTATO BROKERAGE EXCHANGE v. BUSHMAN'S, INC.
PACA Docket No. 2-7258.
Decision and Order filed August 25, 1988.

Dennis Becker, Presiding Officer
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant $1,643.00 with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

Copies of this order shall be served upon the parties.

ATLANTIC FRUIT COMPANY v. RALPH & CONO COMUNALE PRODUCE CORP.
PACA Docket No. 2-7478.
Decision and Order filed August 9, 1988.

Dennis Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant $2,053.93 with interest thereon at the rate of 13 percent per annum from June 1, 1986, until paid.

Copies of this order shall be served upon the parties.

JACK T. BAILLEE CO., INC. v. PAMCO AIRFRESH, INC., and/or VISTA McALLEN, INC.
PACA Docket No. 2-7277.
Decision and Order filed August 29, 1988.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, California, for Complainant.
Carl K Osborne, Los Angeles, California, and Stephen R. Knapp, Los Angeles, California, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint in this proceeding is dismissed. The cross complaint in this proceeding is dismissed.

Copies of this order shall be served upon the parties.

BUJULIAN BROS. PACKING, INC. v. MINNESOTA PRODUCE, INC.
PACA Docket No. 2-7494, and MINNESOTA PRODUCE, INC. v. COUNTRY CLUB MARKET, INC.
PACA Docket No. 2-7532.
Decision and Order filed August 23, 1988.

Dennis Becker, Presiding Officer.
Thomas R Oliveri, Newport Beach, California, for Complainant in PACA 2-7494.
Complainant, pro se in PACA 2-7532.
Stephen P. McCarron, Silver Spring, Maryland, for Respondent in PACA 2-7494
Michael R Cunningham, Minneapolis, Minnesota, for Respondent in PACA 2-7532.
Decision and Order issued by Donald A. Campbell, Judicial Officer

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, Minnesota Produce shall pay Bujulian Bros., as reparation, $29,224.26 plus interest at the rate of 13 percent per annum from September 1, 1986, until paid.

Within 30 days from the date of this order, Country Club shall pay Minnesota Produce, as reparation, $29,459.46 plus interest at the rate of 13 percent per annum from September 1, 1986, until paid.

CAL/MEX DISTRIBUTORS, INC. v. WOLVERINE FRUIT CO.
PACA Docket No. 2-7423.
Decision and Order filed August 8, 1988.

George S. Whitten, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $7,130.15, with interest thereon at the rate of 13 percent per annum from February 1, 1986, until paid.

Copies of this order shall be served upon the parties.

CALIFORNIA ARTICHOKE and VEGETABLE GROWERS CORPORATION v. LOWELL J. SCHY d/b/a LOWELL SCHY BROKERAGE.
PACA Docket No. 2-7177.
Decision and Order filed August 9, 1988.

Duties of broker - Rescission by buyer - Resale by seller as act of dominion.

Broker arranged for sale of a carload of broccoli. Buyer rescinded contract. Seller took dominion over carload and sold it for a lower price. Seller sued broker for price differential. Held broker's duties are to arrange purchase and sale. Absent a showing of negligence it cannot be found liable because buyer rescinds the contract.

Dennis Becker, Presiding Officer.
Thomas R. Olivieri, Newport Beach, California, for Complainant.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act of 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely formal complaint was filed in which complainant sought reparation in the amount of $3,903.20 in connection with the shipment of a railroad car of broccoli in interstate and foreign commerce. Respondent filed an answer in which it denied the allegations of the complaint. Because the amount in controversy is less than $15,000.00 the shortened method of procedure provided in Section 47.20 of the Rules of Practice issued pursuant to the Act was utilized (7 C.F.R. § 47.20). Complainant filed an opening statement and a brief. Respondent filed an answering statement which was not timely filed, and was returned because of that. Respondent resubmitted the answering statement, but this statement has not been considered in this proceeding. Complainant, California Artichoke and Vegetable Growers Corporation, is a corporation located in Castroville, California. Respondent, Lowell J. Schy, is an individual doing business as Lowell Schy Brokerage with an address in Fresno, California. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

Findings of Fact

1. Respondent is a broker. On May 18, 1985, he arranged for the sale of a railroad car of broccoli by complainant to North American Produce Buyers, Limited, Ontario, Canada, consisting of 1,904 cartons of Ocean Mist brand broccoli at $3.15 per carton plus $.85 per carton for cooling and palletizing, and $600.00 for top ice, for a total contract price of $8,216.00, f.o.b. Dan Jeffery represented complainant in the transaction. Respondent dealt with John Bonomo of North American with respect to the transaction. John Bonomo is listed as a buyer for that corporation and had been listed as such for 23 years prior thereto.

2. The transaction was arranged on a Saturday. On Monday, May 20, 1985, a railroad car was loaded with the broccoli and departed from complainant's place of business for Ontario, Canada. May 20, 1985, was a Canadian holiday. On Tuesday, May 21, 1985, respondent called Morris Shoom of North American, and was informed that Morris Shoom had bought three truckloads of broccoli at the same time that Bonomo ordered the railroad car, and that North American did not wish the railroad car of broccoli. Mr. Schy immediately began to make phone calls to seek to place the broccoli elsewhere. He began doing so about 6:00 a.m. on May 21, 1985. He was making progress with respect to placing the broccoli elsewhere. At 7:30 a.m. he reached Dan Jeffery of complainant on the telephone and advised him of the problem.

3. Mr. Schy talked again with Mr. Jeffery on May 21, 1985, at 8:45 a.m. to determine what should be done with respect to the broccoli. Mr. Jeffery told him to forget the car because complainant was handling it instead. Complainant had arranged to sell the carload of broccoli to M. Levin & Company, located in Philadelphia, Pennsylvania for $1.10 per carton plus $.85 for cooling and palletizing and $600.00 for top ice for a total contract price of $4,312.80. Complainant applied its receipts of that amount of money to the original contract price leaving $3,903.20 of the original contract price uncovered.

4. The price that Mr. Schy was negotiating with alternative outlets to North American Produce was $4.00 per carton for the broccoli.

Discussion

7 C.F.R. § 46.28 deals with the duties of brokers. It states in pertinent part as follows:

> The function of a broker is to negotiate, for or on behalf of others, valid and binding contracts. A broker who fails to perform any specification or duty, express or implied, in connection with any transaction is in violation of the Act and is subject to the penalties specified in the Act and may be held liable for damages which accrue as a result thereof. It shall be the duty of the broker to fully inform the parties concerning all of the terms and conditions of the proposed contract. After all parties agree on the terms and the contract is effected, the broker shall prepare in writing and deliver promptly to all parties a properly executed confirmation or memorandum of sale setting forth truly and correctly all of the essential details of the agreement between the parties .... The broker shall retain a copy of such confirmation or memoranda as part of his accounts and records. The broker who does not prepare these documents and retain copies in his files is failing to prepare and maintain complete and correct records as required by the Act. The broker who does not deliver

> copies of these documents to all parties involved in the transaction is failing to perform his duties as a broker. ... If the broker's records do not support his contention that a binding contract was made with proper notice to the parties, the broker may be held liable for any loss or damage resulting from such negligence, or for other penalties provided by the Act for failure to perform his express or implied duties....

The first question which must be dealt with in this proceeding is whether Mr. Schy negotiated a valid and binding contract between complainant and North American. The record does not contain a broker's memorandum of sale. Therefore, based upon the evidence available to us in this proceeding we must conclude that we cannot tell whether Mr. Schy negotiated a valid and binding contract. The second question which must be resolved is whether complainant had a right to believe that there was a valid and binding contract. The evidence is overwhelming that complainant had such a right. Mr. Schy's own submissions in this proceeding reflect clearly that he believed there was a binding and valid contract. He cannot deny that he conveyed such information to complainant, and that complainant acted in reliance on that information when it loaded a rail car with broccoli and sent it towards Ontario, Canada.

There remains to be resolved whether Mr. Schy is liable for the failure of complainant to receive the original full contract price in this proceeding. It appears that the contract was believed to have been entered on May 18, 1985. It also appears that Mr. Schy dealt with an individual who was registered as a buyer of North American. Therefore, we find that Mr. Schy was entitled to believe he had negotiated a valid and binding contract. The goods were actually shipped on Monday, May 20, 1985. This was a holiday in Canada. Very early on the morning of May 21, 1985, Mr. Schy discovered that North American did not desire to receive the broccoli, and was rescinding the contract. He was very diligent in seeking to find alternative outlets, and the evidence is uncontroverted that he was making progress in this regard. At 7:30 a.m. on May 25, 1985, he notified Dan Jeffery, complainant's representative of the problem. Mr. Jeffery was angry. By 8:45 a.m., Mr. Jeffery advised Mr. Schy to forget about the whole business. He had sold the broccoli for a lesser price to a company in Philadelphia. We find based upon the available evidence that complainant, in diverting the broccoli at a much lower price without affording Mr. Schy sufficient opportunity to find alternative outlets at a higher price took possession and control of the carload of broccoli, and effectively absolved Mr. Schy of any responsibility he may have had for negotiating a contract which fell through. More importantly, however, we find that respondent cannot be held liable because there is no proof he was negligent. A broker is not responsible to assure performance by the parties. *Higgins Potato Co. v. Holmes & Barnes, Ltd., et al.*, 20 Agric. Dec. 636 (1961). His responsibility is limited to carrying out specified duties.

Mr. Schy's failure to provide a broker's memorandum was not the causative factor for the problems that arose here.

It may be that a valid contract had actually been negotiated by Mr. Schy, and that North American would have been liable had complainant sued it rather than Mr. Schy. However, because this was not done, we need not reach this issue. In view of the above the complaint in this proceeding must be dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served on the parties.

CALIFORNIA SPROUT & CELERY CO., INC. v. SCHAUMBURG PRODUCE, INC.
PACA Docket No. 2-7249.
Decision and Order filed August 8, 1988.

Sharlene W. Lassiter, Presiding Officer.
Complainant, pro se.
Michael J. Cannon, Palos Heights, Illinois, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent Schaumburg Produce, Inc., shall pay California Sprout & Celery Co., Inc., as reparation, $110.50, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

Copies of this order shall be served upon the parties.

CLUB CHEF, INC. v. S&K FARMS, INC.
PACA Docket No. R 88-93.
Order of Dismissal filed August 3, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

Complainant notified the Department that a settlement has been reached, and authorized dismissal of its complaint filed herein.

Accordingly, the complaint was dismissed.

ERNIE DALIDIO d/b/a ZAPATA SALES v. VIC MAHNS, INC.
PACA Docket No. 2-7416.
Decision and Order filed August 25, 1988.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, California, for Complainant.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant $1,320.00, with interest thereon from November 1, 1985, at the rate of 13 percent per annum until paid.

Copies of this order shall be served upon the parties.

FLORIZA SALES CO., INC. v. PAMCO AIR FRESH, INC.
PACA Docket No. 2-7187.
Decision and Order filed August 8, 1988.

Agency - Apparent authority - Estoppel - Contracts - Corporate veils - Evidence--third parties - Invoices--duty to deny accuracy.

Complainant sold goods to a third party, but at the suggestion of the third party, billed respondent. A number of other parties did the same. There was evidence of interrelationships between respondent and the third party. Held: that evidence did not show that respondent, directly or indirectly, held itself out to complainant as being willing to accept billings for goods sold to third party. Thus, it could not be found liable.

Dennis Becker, Presiding Officer.
James A. Soto, Nogales, Arizona, for Complainant.
Stephen R. Knapp, Los Angeles, California, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $23,338.60, plus interest, in connection with eighteen transactions in interstate and foreign commerce involving the purchase and sale of produce in December 1985 and January 1986.

A copy of the Department's report of investigation was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying that it had purchased or received any of the produce. An oral hearing was held on February 11 and 12, 1987 in Los Angeles, California, and on December 8 and 9, 1987 in Nogales, Arizona. Both parties were represented by counsel. Thereafter, both parties filed briefs.

Findings of Fact

1. Complainant, Floriza Sales, Co., Inc., hereinafter referred to as complainant or as Floriza, is a corporation with an address at P.O. Box 1326, Nogales, Arizona 85628. At the time of the transaction involved in this proceeding complainant was licensed under the Act.

2. Respondent, Pamco Air Fresh, Inc., hereinafter referred to as respondent or as Pamco, is a corporation with an address at 1550 East Franklin Avenue, El Segundo, California 90245. At the time of the transactions involved in this proceeding respondent was licensed under the Act.

3. On October 9, 1985, a business known as Vista McAllen, Nogales, Inc. was incorporated. Its incorporators were Ted D. Elmer and Mathias A. Mentges. Its officers were Ted D. Elmer and Mathias Mentges. Its directors were Ted D. Elmer and Peter and Mathias Mentges. Its stockholders were Ted D. Elmer and Mathias Mentges. It was affiliated with Vista McAllen, Inc., (hereinafter sometimes called Vista McAllen Los Angeles) an incorporated business licensed under the PACA which is located in Los Angeles, California. Vista McAllen Los Angeles was incorporated in 1983. Its officers were Ted D. Elmer, Mathias A. Mentges, and Michael Mentges. Its directors were Ted D. Elmer, Mathias A. Mentges, and Michael Mentges and also Peter Mentges until February 28, 1986. Its stockholders were Ted D Elmer, Mathias A. Mentges, and Michael Mentges.

4. Vista McAllen Nogales began doing business in September or October 1985. Its address was 1852 Royal Road, P.O. Box 55, Nogales, Arizona 85621. Its manager was James Moreno. Benjamin Carbajal was also actively affiliated with the firm.

5. There was located at the same address as Vista McAllen Nogales a firm known as M.E.G., Inc., hereinafter "M.E.G.". This firm was ostensibly owned by Elaine Moreno, the wife of James Moreno. However, James Moreno was the individual who was actively involved in the daily operations of M.E.G.

6. Both Vista McAllen, Nogales and M.E.G. were licensed under the PACA in late 1985 and 1986.

7. Vista McAllen Nogales and M.E.G. were created to purchase and sell produce. Although they were ostensibly separate businesses, many of their produce activities became intermingled either as a result of extreme carelessness on the part of James Moreno, or as a result of his deliberate endeavors.

8. Vista McAllen Nogales purchased perishable agricultural commodities, mostly of Mexican origin, in interstate and foreign commerce from a large number of produce houses. It resold the produce primarily to a firm known as Apex, located in Montreal, Canada. At times purchases and/or sales were recorded as having been made by M.E.G. so that it became difficult to determine which of the two businesses were actually involved. The records of Vista McAllen Nogales and M.E.G. were very badly maintained. It is apparent, however, that the accounts receivable from Apex were not fully collected by either firm. Whether money actually received was otherwise siphoned off does not appear from the evidence adduced in this case.

9. Pamco is a business which, insofar as produce is concerned, is primarily involved in the importation of produce from South America. Its owner is Peter Mentges. He has two sons, Mathias Mentges, and Michael Mentges. Mathias Mentges is the same individual who is involved with Vista McAllen and Vista McAllen Nogales.

10. Because of the family relationship of members of the Mentges family with Vista McAllen and Vista McAllen Nogales, Pamco was shown in 1985 in a trade publication known as the "Blue Book" as being affiliated with Vista McAllen Nogales. Whether anyone authorized such statement is unknown. Pamco had an excellent credit rating in the "Blue Book" in 1985.

11. James Moreno was well known in Nogales, Arizona. He enjoyed a very poor reputation for meeting his financial obligations. He had once owned a produce business known as Veg-Pro, Inc. The facts of Veg-Pro's violations of the Act were published by the PACA in 1983 because it failed to pay produce debts. Benjamin Carbajal was well known in Nogales, Arizona. He enjoyed a poor reputation for meeting financial obligations. He had once owned a produce business known as Carby's. Disciplinary action was taken against Carby's by the PACA because it failed to pay produce debts.

12. As a new business Vista McAllen Nogales had no credit rating in the fall of 1985. Therefore, many businesses were not willing to sell it produce, particularly because James Moreno and Benjamin Carbajal were affiliated with it. As a result Mr. Moreno and Mr. Carbajal told many businesses that Vista McAllen Nogales was affiliated with Pamco, and that Vista McAllen Nogales was buying for Pamco. Typically, sellers were told to

bill Pamco, send the invoices to a Nogales post office box, and send the produce to Vista McAllen Nogales. Vista McAllen Nogales would then ship the produce elsewhere, primarily to Canada. Mr. Moreno wold then send the invoices to Pamco. This practice began in September or October, 1985.

13. In late October 1985, Peter Mentges talked with his son, Mathias Mentges, and told him that billings were being received by Pamco for produce purchased by Vista McAllen Nogales. He told him this practice must stop. He confirmed his oral statements in a letter to his son, Mathias, dated October 31, 1985. The practice was not stopped. Mr. Moreno and Mr. Carbajal continued to tell sellers until late January 1986 that Vista McAllen Nogales was affiliated with Pamco, and that Pamco was to be billed. Many businesses sold produce to Vista McAllen Nogales based on the representations of Mr. Moreno and Mr. Carbajal.

14. Numerous invoices were made out to Pamco by businesses which believed Pamco would receive and pay the invoices. Pamco did not pay them. Typically, it either sent the individual invoices to Vista McAllen, Los Angeles, or returned them to the seller with a notation that Pamco should not be billed. With respect to the 18 transactions involved in this proceeding Pamco returned at least three invoices to Floriza with a notation that Pamco should not be billed.

15. A number of the sellers of produce to Vista McAllen Nogales checked Pamco's creditworthiness prior to making sales. Some of them also attempted to call Pamco prior to making such sales to ascertain whether Pamco would accept the invoices. The listed phone number at Pamco received a few such calls. However, the length of the phone calls shows that they almost always were brief.

16. When they were not paid by Pamco some of the produce sellers phoned Pamco to ask why payment was delayed. Pamco was not always reached. When reached, sometimes Pamco denied that it was obligated to pay. At other times it referred the caller to Vista McAllen Los Angeles.

17. In December 1985, Mr. Carbajal approached Mr. Carlos Gutierrez of Floriza, and asked him to sell produce to Vista McAllen Nogales. Mr. Gutierrez was aware of the reputation of both Mr. Moreno and Mr. Carbajal. As a result he declined to sell produce to Vista McAllen Nogales. Mr Carbajal told him his firm was affiliated with Pamco, and Pamco would pay the billings. Mr. Gutierrez checked the financial status of Pamco in the "Blue Book." He saw an apparent affiliation. He began selling produce to Vista McAllen Nogales without checking first with Pamco to ascertain whether it would receive the billings.

18. Floriza's first sale to Vista McAllen Nogales occurred on Decembe 7, 1985. Floriza's last sale to Vista McAllen Nogales was on January 15, 198 Floriza sent all billings directly to Pamco. It is not known what Pamco d with some of the billings it received from Floriza. However, in the middle o

January 1986 Michael Mentges returned at least three invoices to Floriza with notations that Pamco should not be billed because it had not ordered the produce involved. Pamco noted that Vista McAllen Nogales should be invoiced. Mr. Gutierrez, complainant's representative, first called Pamco to discuss the invoices on January 21, 1986. He was advised to talk with Mathias Mentges or Ted Elmer at Vista McAllen Los Angeles. He did so, and talked with Mathias Mentges, who told him that "they were working on the bills, that we would get paid, not to worry." (Tr. 369)

19. Respondent has not paid complainant any money with respect to the 18 transactions involved in this proceeding.

20. A formal complaint was filed on March 18, 1986, which was within nine months of the time the causes of action herein arose.

Discussion

This proceeding, involving 18 transactions, in which complainant, Floriza Sales Company, sold produce to Vista McAllen, Nogales, Inc., but billed Pamco Air Fresh, Inc., is one of a large number of cases in which the individual complainants followed such a course of action. There are a number of facts which are not controverted. The relevant uncontroverted facts are that between December 7, 1985, and January 15, 1986, complainant sold to Vista McAllen Nogales in 18 transactions produce with a total contract price of $23,338.60, for which it had not been paid. It further appears that in late November or early December 1985, Benjamin M. Carbajal, an employee of Vista McAllen Nogales, approached Carlos Gutierrez, the office and sales manager for complainant, and sought to purchase produce from complainant. Mr. Gutierrez knew that Mr. Carbajal had a poor business reputation in Nogales, Arizona. He also knew that Mr. James Moreno was associated with Vista McAllen Nogales, and that he enjoyed at least an equally poor reputation. Therefore, Mr. Gutierrez declined initially to do business with Vista McAllen Nogales. However, Mr. Carbajal told him that Pamco Air Fresh was standing behind the purchases, and that Floriza could bill respondent, which company would pay the billings. Mr. Gutierrez checked the trade publication known as the "Blue Book", and found what appeared to be a corporate affiliation between Pamco and Vista McAllen Nogales. He also made inquiries of other persons, and drew the conclusion that the respondent would pay invoices. Significantly, he did not at that time make any phone calls to Pamco to ascertain whether it would stand behind billings it might receive. Based upon Mr. Carbajal's representations and knowledge that he gathered elsewhere, Mr. Gutierrez determined that Floriza could sell to Vista McAllen Nogales.

After each sale of goods to Vista McAllen Nogales, complainant sent an invoice to respondent. Respondent was also receiving numerous invoices from other sellers of produce to Vista McAllen Nogales. Respondent knew that there was a problem with respect to its being billed by the various sellers. On October 31, 1985, Mr. Peter Mentges, the president of Pamco, sent a letter to his son Mathias Mentges at Vista McAllen, located in Los Angeles, an

affiliated company with Vista McAllen Nogales, and told him that Pamco was receiving such billings and that the practice must stop. The record also shows that the practice of having billings sent to Pamco did not stop. Mathias Mentges testified that he had conveyed the information to both Mr. Moreno and Mr. Carbajal that they were to stop telling sellers of produce to bill Pamco. Mr. Moreno and Mr. Carbajal denied that they ever received such information. There was also a letter dated March 6, 1986, proffered by Mathias Mentges which told Mr. Moreno and Mr. Carbajal not to have billings sent to Pamco. Mathias Mentges said the letter was actually written in November 1985. Given the date discrepancy, we find his testimony in this regard lacks credibility. Based upon our analysis of the evidence and conclusions as to the credibility of the witnesses, we believe that information of this nature was given to both Mr. Moreno and Mr. Carbajal in November 1985. However, it is apparent that since Vista McAllen Nogales could not have purchased and sold produce if other businesses would sell to it, we conclude that particularly Mr. Moreno, and Mr. Carbajal in conjunction with him, chose to ignore the admonition not to have billings sent to Pamco. Whether this is the case would not, however, alter our resolution of the dispute in this proceeding.

The evidence also reveals that Mr. Moreno had personal motives to represent that Pamco would pay invoices for sales made to Vista McAllen Nogales. There existed at the same location as Vista McAllen Nogales a business known as M.E.G., ostensibly owned by Mr. Moreno's wife, but which he managed. Mr. Moreno was, therefore, operating two businesses at the same time. When he purchased produce he tended to buy in the name of Vista McAllen Nogales. When he sold produce he often did so in the name of M.E.G. Thus, the affairs of the two businesses became commingled in such a way that it was impossible to disentangle the business affairs of one from the other. Having invoices sent to Pamco helped in this regard.

Pamco's handling of the invoices which it received from various sellers to Vista McAllen Nogales was inconsistent after November 1, 1985. It appears from the record that most of the time the invoices were transmitted in one fashion or another to Vista McAllen Los Angeles for payment. Some of the invoices may have been destroyed without being forwarded. Other of the invoices were returned to shippers with a notation that Pamco should not be billed. Indeed, at least three such billings were returned to complainant with a notation to this effect. This was done sometime after January 10, 1986.

The record also makes it clear that Pamco never ordered any of the goods involved in this proceeding. Neither did Pamco receive any of the shipments of the produce. Rather, we conclude that Pamco was an unwilling recipient of invoices from Floriza Sales, but was not as diligent as it might have been in dealing with the problem which obviously existed, not only with Floriza, but also with a number of other shippers of produce. It appears to have felt that

by notifying Mathias Mentges that the practice of invoicing Pamco should stop it had done all that it could other than sending invoices to Vista McAllen Los Angeles or returning them with a notation to the seller involved. Its failure to take more drastic action to stop the practice gives rise to the single most important issue to be resolved in this proceeding, which is whether it had a higher duty to notify shippers that it would not accept billings than merely to send them to another business or return them to the shipper. We will discuss this matter subsequently.

Complainant seeks to bolster its claim against respondent by showing that there were corporate inter-relationships between respondent and Vista McAllen Los Angeles, which it argues must also be deemed to affect Vista McAllen Nogales. In addition, in support of its theory in this regard, complainant points out that most of the sales by Vista McAllen Nogales were to a company known as Apex, located in Montreal, Canada. Apex was affiliated with Vista McAllen Los Angeles. While the corporate inter-relationships are troublesome, the evidence does not lead us to the conclusion that Pamco it sufficiently closely connected with Vista McAllen Nogales as to warrant the conclusion, through piercing the corporate veil, that it should be held liable for Vista McAllen Nogales' obligations on this theory. Peter Mentges, the president of Pamco, was a director of Vista McAllen Los Angeles at least through February 1986. Although he, and Ted and Larry Elmer, testified that Mr. Mentges submitted his resignation in April, 1985, no documentation in support of that testimony was provided. Mr. Mentges' claim is self-serving because the transactions giving rise to the dispute in this proceeding first occurred in early December, 1985. In controversion of his claim is the license certificate under which Vista McAllen Los Angeles did business, which was on file with the Perishable Agricultural Commodities program in Washington, D.C., and of which this tribunal took official notice. That document reflected that Peter Mentges remained a director of Vista McAllen Los Angeles until February 28, 1986. Because Mr. Mentges' testimony is self-serving, and the information contained in the license of Vista McAllen Los Angeles is presumed to be correct unless shown by extrinsic evidence not to be, we draw the conclusion that Mr. Mentges did not show that he was not directly affiliated with Vista McAllen Los Angeles in November and December, 1985, and January, 1986. We also note that Mr. Mentges loaned to Vista McAllen Los Angeles $900,000.00 prior to November 1985, no part of which apparently had been repaid as of the date of this hearing. Thus, Mr. Mentges had motivation to attempt to find ways by which to recoup his money. Furthermore, Mathias Mentges, Peter Mentges' son, was directly involved in the activities of Vista McAllen Los Angeles, and also Vista McAllen Nogales, in the months involved in this proceeding. Such familial connection certainly gives rise to a suspicion that Pamco could have had a more direct interest than was shown at hearing to have been the case in the activities of Vista McAllen Nogales. Unfortunately for complainant, all its evidence was merely supposition. There was no documentation to show that Pamco had any expectation of receiving any monies as a result of the

business activities of Vista McAllen Nogales. Nor was there any information indicating that they had derived a benefit from those activities. Complainant had the burden of proof to show more clearly than it did an interest in the success of Vista McAllen Nogales on the part of respondent. *R.L. Peed v. F&G*, 32 Agric. Dec. 285 (1973); *New York v. Sandler*, 32 Agric. Dec. 702 (1973). Its failure to do so leads us to the conclusion that the corporate veil may not be pierced so as to include Pamco as a part of the Vista McAllen Los Angeles-Vista McAllen Nogales operation. Also, there is no evidence which connects Pamco with Apex in Canada. We note parenthetically that there is serious question as to whether Apex paid for all of the produce which it received, thereby raising questions as to the Vista McAllen Los Angeles-Apex connection.

Complainant endeavored valiantly to bolster its case with testimony from a number of witnesses as to alleged or actual contacts with either Peter Mentges or his son Michael Mentges in October, November, and December 1985, and January 1986. The contacts allegedly showed that one or the other of the two Mentges members of Pamco authorized submission of the billings. Again, as to the proponent of this position, complainant had the burden to show that such was the case. In our view, it failed to do so. Respondent objected to the receipt of testimony of individuals not directly related to complainant with respect to Pamco's involvement with Vista McAllen Nogales on the grounds that their testimony could not be connected to the decision-making process of complainant to sell produce to Vista McAllen Nogales. We permitted this testimony in order to give complainant every opportunity to prove its case. We are constrained to note at the outset, however, that we agree with respondent that the testimony of witnesses not directly connected with complainant, unless connected to the decision-making process of complainant, can carry very little weight in a determination as to whether respondent is liable to complainant. We must go further, in this instance, because based upon the testimony adduced at hearing it is our conclusion that the testimony proffered by complainant through such witnesses did not show that Pamco had any involvement in the Vista McAllen Nogales deal, even taking their testimony in the light most favorable to complainant.

The most important testimony is that of complainant's office manager, Carlos Gutierrez. He admitted that he sold to Vista McAllen Nogales based upon representations of Mr. Moreno and Mr. Carbajal, known to be individuals of questionable business reputation, that Pamco Air Fresh would pay the billings if the invoices were sent to it. Mr. Gutierrez made no direct inquiry of Pamco as to whether it would accept the billings, but rather relied upon his business judgment that Mr. Moreno, and particularly Mr. Carbajal, were providing him with accurate information as to Pamco's willingness to pay the invoices. Mr. Gutierrez authorized 18 sales of produce to Vista McAllen Nogales. It was not until five days after the last sale, January 20, 1986, that

he called Pamco to find out why complainant was not receiving payment. Presumably his phone call was made several days after complainant received at least three invoices from Pamco which were returned with notations that Pamco would not underwrite the billings. We believe that those invoices were returned around the middle of January. Its own actions are the only evidence upon which the complainant should be allowed to rely in its assertion that Pamco had held itself out as willing to pay invoices for produce sold to Vista McAllen Nogales. Mr. Gutierrez's testimony reveals that an inadequate check was made as to Pamco's status, and that complainant was not sufficiently judicious in its decision to sell to Vista McAllen Nogales.

Other testimony upon which complainant sought to show that Pamco had agreed to accept billings does not lead us to reach the conclusion that it did so with respect to parties other than complainant. The testimony of the several witnesses who testified on behalf of complainant was lacking in probative force. The evidence does not show either that Pamco colluded with Vista McAllen Los Angeles and Vista McAllen Nogales, or that in any event Pamco agreed to accept the billings of Vista McAllen Nogales. With respect to all of the transactions, which were apparently telephone conversations between various produce personnel and someone at Pamco in Los Angeles, as verified from time to time by telephone billings, the evidence was always vague as to whether there actually was a direct contact with either Peter Mentges or Michael Mentges in which Pamco stated that it would accept the billings.

Steve Garner, an employee of El Dorado Packing Company in Indio, California, in 1985 and 1986, stated that around October 27, 1985, he called Pamco to verify whether it was willing to accept a billing from Vista McAllen Nogales. He stated that Pamco said it would accept the billing with respect to a single transaction, and that after that Mr. Garner and Mr. Moreno entered into a series of transactions with the same billing arrangement, evidently without checking with Pamco. However, Mr. Garner did not provide telephone records to show to whom that telephone call was made or the length of the telephone call. We further note that October 27, 1985, was a Sunday. This raises serious question as to whether either Peter Mentges or Michael Mentges would have been in their office.

Jaime Hernandez, an employee of Azteca Produce Co., Inc. in 1985, testified that before invoicing Pamco in early January 1986 he discussed whether Pamco would accept billings with "Mike" Mentges. He stated that "Mike" Mentges approved billings based upon sales to Vista McAllen Nogales. However, Mr. Hernandez was not able to provide telephone records which would reflect that a telephone call had been made. Furthermore, the telephone conversation allegedly occurred in early 1986, after the date on which complainant had begun to enter transactions with Vista McAllen Nogales. Therefore, complainant cannot rely on these alleged conversations to bolster its own case if it wishes to claim that it had talked to other members of the industry in Nogales, Arizona. Finally, Michael Mentges insists that he does not allow people to call him "Mike". He says that he

would never have answered the telephone by identifying himself as "Mike" as alleged by Mr. Hernandez. Mr. Hernandez's testimony lacked probative value insofar as the alleged conversation is concerned. Michael Mentges' testimony was credible in this regard.

Hector Ortiz, an employee of Bravo Distributors Inc., in 1985 and 1986, claimed to have called Pamco around November 19 or 20, 1985, and received authority to bill Pamco for produce sold to Vista McAllen Nogales. However, he did not provide telephone records which show that such a phone call had been made. He did provide a record which showed that a call was made on December 9, 1985. However, that record showed that the call lasted only two minutes. We cannot find that his testimony was probative of the fact that Pamco committed itself to pay for produce sold to Vista McAllen Nogales.

Complainant also called four other witnesses, Anna Astrid Celaya, Mike Annett, Robert A. Quihuis, and Reuben Pesqueira. Ms. Celaya, and Mr. Annett and Mr. Quihuis, represented companies which also had brought suit against Pamco for failure to pay for produce purchased and received by Vista McAllen Nogales. Mr. Pesqueira represented a company which had sold to Vista McAllen Nogales, had invoiced Pamco, and been paid by Vista McAllen Los Angeles. The testimony of these four individuals is not sufficient to involve Pamco in the Vista McAllen Nogales arrangement with respect to the purchase of and payment for produce. Ms. Celaya checked Pamco out through the "Blue Book" and found that it was a reputable firm, as a result of which she was willing to sell to Vista McAllen Nogales. She did not make phone calls to Pamco until late January, 1986, even after complainant had not received payment for its produce sales. Mr. Annett said that he did not talk with Pamco until January 23, 1986. This was after complainant had made its last sale to Vista McAllen Nogales. Mr. Quihuis said that his firm had actually received payment from Vista McAllen Los Angeles, with respect to two of four invoices. He also stated that Pamco never sent back any invoices to his firm. Mr. Pesqueira said his firm sent invoices to Pamco, which invoices were sent on to Vista McAllen Los Angeles and paid.

We find based upon our analysis of the testimony of all of the witnesses, including Mr. Gutierrez, the representative of complainant, that there is no direct link between Vista McAllen Nogales, Pamco, and the sellers of produce to Vista McAllen Nogales who were not paid. Rather, we conclude from the evidence that Pamco became aware that representatives of Vista McAllen Nogales were using its name in late October, 1985, advised Mathias Mentges both orally and in writing in late October that the practice must stop, but that the practice was not stopped. Pamco then received a number of billings from a number of businesses which sold to Vista McAllen Nogales, and handled the receipt of those invoices in various ways. The question which remains for resolution is whether Pamco, having been put on notice that it was being sent billings for sales made to Vista McAllen Nogales, had an obligation to notify

businesses directly, through trade publications, or otherwise, that it would not pay the bills of Vista McAllen Nogales. It is our conclusion based upon an analysis of the applicable legal principles that Pamco did not have such an obligation. Therefore, it cannot be held liable by virtue of its failure to notify sellers of produce to a third party. Furthermore, even if it did, we find that it did give timely notice to complainant because the first transaction occurred on December 7, 1985, with the invoice arriving some time later, and a little more than a month from that date Pamco had returned invoices to Floriza with the notation that they would not accept the billings. Timeliness, particularly during the Christmas season, does not require an immediate denial. This is even more clearly the case here because both Peter Mentges and Michael Mentges were on holiday in late December and early January. In addition, there was no showing that Pamco had reason to believe the bills would not be paid.

It is clear that there was no contract between Pamco and Floriza. Pamco never agreed to participate in the transactions between Floriza and Vista McAllen Nogales. Therefore, it cannot be held liable on the basis that it was a party to the contract. Furthermore, we find that there was no agency agreement between Pamco and Vista McAllen Nogales. It is true that Mr. Carbajal and Mr. Moreno represented that Pamco would accept billings for produce sold to Vista McAllen Nogales. However, we cannot find on this record any evidence that Pamco ever authorized directly that such an agency arrangement could be entered into. Thus, with respect to a simple agency theory, Pamco must prevail. *Central & South American Imports Co. v. West Indies Food & Importing, Inc.*, 34 Agric. Dec. 1015, 1020 (1975).

It was also argued that Vista McAllen Nogales, through Mr. Carbajal and Mr. Moreno, had apparent authority to tell sellers of produce to Vista McAllen Nogales that Pamco would pay the invoices. If such were the case, Pamco would then be estopped to deny that it would accept the invoices and pay them. However, we cannot reach such a conclusion. We note that the risk of a lack of authority in an agent is on Floriza rather than on Pamco. Floriza acts at its own peril when it accepts the representations of an individual or organization that it has authority to involve a third party in the transaction. *Pasco County Peach Association v. J.F. Solly & Co.*, 146 F.2d 880 (4th Cir., 1945). We also find that the necessary elements for the doctrine of estoppel to apply are not all present. Those elements are that the principal has given indicia of authority to the agent or has knowingly permitted or caused another to appear to be its agent, there must be a representation of the agency by the principal, there must be reliance upon such representation

hird party, and such representation must have been acted on in good
o the injury of that third party. *Sunny Sally, Inc. v. Ray Burke Farmer*,
ric. Dec. 268 (1964). We cannot find that Pamco ever represented to
dy that Vista McAllen Nogales, through Mr. Carbajal and Mr. Moreno,
uthority as its agent to have invoices sent to Pamco for payment.

Complainant cites several cases in support of its position that the doctrine of estoppel should be applied in this case. Because we have found that Pamco was not tardy in advising Floriza that it would not accept the invoices tendered to it, this issue need not be addressed further. In any event, we do not believe the cases cited by complainant support imposition of the doctrine of estoppel even if respondent were tardy.

The first case cited by complainant is *George Arakelian Farms, Inc. v. Leonard O'Day Company*, 31 Agric. Dec. 303 (1982). In that case William Kirchberg purchased from George Arakelian many trucklots of lettuce over a long period of time. Such purchases were made in the name of Leonard O'Day Company. Leonard O'Day Company made payment on its own checks with respect to 55 transactions between February 1969 and April 1970. There were in issue in the proceeding 20 other transactions in which George Arakelian Farms sued Leonard O'Day Company. Leonard O'Day Company raised as a defense the fact that Mr. Kirchberg was not its agent, but rather was making the purchases as a principal. Both Mr. Kirchberg and Leonard O'Day claimed that Leonard O'Day was merely acting as a conduit with respect to the other 55 transactions because Mr. Kirchberg had poor credit ratings. Because there has been a prior course of conduct in which Leonard O'Day Company had, indeed, held itself out as the purchaser of the lettuce, it was found that Leonard O'Day Company was estopped to deny that it was the purchaser with respect to the 20 transactions in issue. Rather, Leonard O'Day had given Mr. Kirchberg apparent authority to purchase for Leonard O'Day Company as its agent, and George Arakelian Farms had acted in detrimental reliance on that apparent authority. Obviously those facts are different from those in this proceeding in which there was no prior course of conduct upon which Floriza Sales could reasonably rely.

Complainant cited *A. Levy & Zenter Company v. American National Growers Corporation*, 19 Agric. Dec. 1022 (1960), as supportive of its contention that respondent should be held liable. In that case respondent's representative was generally known in the purchase area as a buyer of potatoes for respondent. When some transactions were not paid for respondent denied that the employee had the authority to buy potatoes for it. However, the tribunal found that respondent had put the employee in a position to represent it, and cloaked him with such authority, which was a positive act, and was therefore estopped to deny that the purchaser was an agent for respondent. Complainant claims that the statement "[I]t is a general rule that, where a principal by any act or conduct knowingly causes or permits another to appear as his agent, either generally or for a particular purpose, he will be estopped to deny such agency" supports its position. We do not agree. We cannot find based upon the record available in this proceeding that Pamco knowingly caused or permitted Vista McAllen Nogales through Mr. Carbajal and Mr. Moreno, to appear to be its agent as regards any transactions with

any sellers. This is even more so insofar as Floriza Sales is concerned. We do believe that Pamco was somewhat careless in the way in which it dealt with the problem after early November 1985 because it did not seek to ascertain directly why it was still receiving billings. However, that is not action. Rather, it smacks of Pamco not being as diligent as it might have been to persons with whom it had no business relationship.

Gulf and Western Food Products Company v. Prevor-Mayrsohn International, Inc., 34 Agric. Dec. 1911 (1975), involved a case in which a bank cashed a check drawn on respondent's account, which check had the notation "by endorsement this check is accepted in full payment of following account". Respondent claimed that the bank had apparent authority to receive and cash the check, and its actions bound the complainant. The finding was that such was the case. This case is too far removed from the factual circumstances of the instant case for us to accept its findings as having any validity insofar as complainant's contentions here are concerned. Furthermore, it is clear that the real issue in this case was whether there was an accord and satisfaction, which issue is not present in the instant case.

The last case cited by complainant is *The Hubbard Company v. The Auster Company, Inc., et al.*, 41 Agric. Dec. 303 (1982). In that case Oscar Kaesh contacted a broker, The Richard Kaiser Company, and told the broker that a company known as United Produce Distributors had been purchased by The Auster Company, and wanted to purchase lettuce on behalf of The Auster Company. Mr. Kaesh held himself out as an agent of The Auster Company. On this basis complainant sold lettuce and had an invoice sent to The Auster Company. United made partial payment for the load of lettuce, and said it was responsible for the transaction, and was liable for the remainder of the indebtedness. Based upon the facts in the record the Presiding Officer also found that The Auster Company was liable for the unpaid portion. The Presiding Officer premised his conclusion on the fact that the invoice which showed The Auster Company as the buyer was sent to The Auster Company and not objected to by The Auster Company. In addition, the Auster Company apparently initially received and accepted the produce, and admitted receiving the invoice. It claimed that it had returned the invoice to complainant with a notation that it had not purchased the merchandise. Under these circumstances, the Presiding Officer found that The Auster Company failed to show that it had objected to complainant's invoice naming it as the buyer. Because there was no proof that it had objected, the Auster Company was held liable for the unpaid portion of the indebtedness for the lettuce. The problem for The Auster Company arose because at the time of the transaction it and United thought they had merged, but the merger fell through. Insofar as Floriza Sales is concerned, as we have discussed above, we have found that Pamco made timely objection to the invoices which were sent to it, fully disclosing that it was not willing to accept liability for the sales made to Vista McAllen Nogales. Therefore, on that basis alone *Hubbard* cannot stand for the proposition that Pamco should be held liable.

In view of the above discussion the complaint against Pamco must be dismissed. In cases of this nature an award of attorney's fees to the prevailing party is appropriate. Respondent submitted a claim for fees and expenses in the total amount of $10,017.47. This claim included 67.05 hours at $125.00 per hour for total attorney's fees of $8,381.25. It also included $1,213.75 for subsistence and mileage for the attorney, the representatives of respondent, namely Peter Mentges and Michael Mentges, and also for subsistence and mileage for Mathias Mentges, as well as automobile rental expenses and other miscellaneous expenses. Finally there was a cost of the transcript of the hearing of $422.47. Complainant objected to witness fees for Peter Mentges, Mathias Mentges, and Michael Mentges for February 11, 1987, and for Peter Mentges and Michael Mentges for February 12, 1987, in the amount of $302.80, and certain mileage charges for appearances of those witnesses on February 11 and February 12, 1987, in the total sum of $38.20 for a total objection of $341.00. Complainant claims that the Rules of Practice (7 C.F.R. § 47.18) provide that fees and mileage shall be paid only to witnesses "who are subpoenaed and who appear in the proceeding", and that "Witness fees and mileage shall be paid by a party at whose instance the witnesses appear, and claims therefor be presented to such party". Because there were no subpoenas respondent maintains that those fees should not be allowed. We agree with respondent and will disallow the claim in the total amount of $341.00. This leaves $9,676.47 in attorney's fees and other expenses through the date of hearing to which respondent is entitled to receive reparation.

Order

The complaint in this proceeding is dismissed.

Within 30 days from the date of this order complainant shall pay to respondent for attorney's fees and miscellaneous expenses $9,676.47 with interest thereon at the rate of 13 percent per annum from the first day of the month after the date of this order, until paid.

Copies of this order shall be served upon the parties.

4-STAR TOMATO, INC. v. W.W. ROGERS & SONS PRODUCE, INC.
PACA Docket No. 2-7406.
Decision and Order filed August 8, 1988.

Dennis Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant $11,471.67, with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

Copies of this order shall be served upon the parties.

GEORGIA VEGETABLE CO. v. GERONIMO'S, INC.
PACA Docket No. R 88-218.
Order filed August 23, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely informal complaint was filed on October 14, 1987, and a formal complaint was filed on January 11, 1988. Complainant seeks to recover $5,770.35 which amount is alleged to be the total purchase price for mixed vegetables sold to and accepted by respondent on July 21, 1987. Respondent filed an answer to the formal complaint on June 23, 1988, admitting that $3,670.35 of the amount claimed by complainant was due and owing to complainant on account of the transaction(s) involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

> If after the respondent has filed an answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $3,670.35. Payment of this amount shall be made within 30 days from the date of this order with interest hereon at the rate of 13 percent per annum from September 1, 1987, until

paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

EDWARD H. GRAFF, JR. v. CHARLES OCHS.
PACA Docket No. 2-7506.
Decision and Order filed August 9, 1988.

Edward M. Silverstein, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within thirty days from the date of this order, respondent shall pay to complainant as reparation, $1,904.10, plus interest thereon, at the rate of 13 percent per annum, from August 1, 1986, until paid.

Copies of this order shall be served upon the parties.

HYLAND LAKES BRAND, INC. v. BUSHMAN'S, INC.
PACA Docket No. 2-7272.
Decision and Order filed August 8, 1988.

Dennis Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay to complainant $753.09, with interest thereon at the rate of 13 percent per annum from March 1, 1986, until paid.

Copies of this order shall be served upon the parties.

KROME AVENUE BEAN GROWERS, INC. d/b/a KROME AVENUE SALES v. GENERAL PRODUCE, INC.
PACA Docket No. 2-7428.
Decision and Order filed August 9, 1988.

George S Whitten, Presiding Officer
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint is dismissed.

Copies of this order shall be served upon the parties.

LANDMARK PRODUCE SALES v. HUDIS PRODUCE CO.
PACA Docket No. R 88-77.
Order filed August 23, 1988.

Order issued by Donald A Campbell, Judicial Officer

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely informal complaint was filed on July 17, 1987, and a formal complaint was filed on September 28, 1987. Complainant seeks to recover $11,850.00 which amount is alleged to be the total purchase price for onions sold to and accepted by respondent on May 5, 1987. Respondent filed an answer to the formal complaint on January 15, 1988, admitting that $6,621.50 of the amount claimed by complainant was due and owing to complainant on account of the transaction(s) involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

> If after the respondent has filed an answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $6,621.50. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from June 1, 1987, until paid.

A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

MARTORI BROS. DIST. v. C.H. ROBINSON COMPANY.
PACA Docket No. R 88-101.
Order of Dismissal filed August 3, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

Complainant notified the Department that a settlement has been reached, and authorized dismissal of its complaint filed herein.

Accordingly, the complaint was dismissed.

MERIT PACKING COMPANY v. PAMCO AIRFRESH, INC.
PACA Docket No. 2-7276.
Decision and Order issued August 23, 1988.

Verification--proper form and person - Contracts--proof of - Agency--estoppel to deny - Effect of failure to deny.

Complainant contracted to sell produce. It believed respondent was the buyer. It invoiced the respondent which denied knowledge of the transaction. All testimony was of complainant by complainant's legal representative. It was held that the testimony lacked evidentiary value because complainant had no direct knowledge of the facts set forth. Because complainant had the burden of proof, respondent prevailed since mere delay by respondent in denying involvement in transaction of the receipt of invoice did not make it liable.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, California, for Complainant.
Stephen R. Knapp, Los Angeles, California, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
Preliminary Statement

This is a reparation proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act of 1930, as amended (7 U.S.C. §

499a *et seq.*). A timely formal complaint was filed March 25, 1986, in which complainant alleged that respondent owed it $8,970.50 in connection with the sale and shipment of a truckload of lettuce in interstate commerce. Respondent filed an answer in which it denied the allegations of the complaint. In addition, it filed a cross claim against Vista McAllen, Inc., Vista McAllen Nogales, Inc., James P. Moreno, Benjamin M. Carbajal, and El Dorado Packing. Because the amount in controversy is less than $15,000.00, the shortened method of procedure provided in Section 47.20 of the Rules of Practice issued pursuant to the Act is applicable (7 C.F.R. § 47.20). Complainant is a corporation located in Salinas, California. Respondent is a corporation located in El Segundo, California. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

Findings of Fact

1. On December 3, 1985, complainant sold 900 cartons of lettuce for a total contract price of $8,970.50, f.o.b. The contract was negotiated by El Dorado Packing Company, which acted as the broker. On December 3, 1985, the truckload of lettuce was shipped from Arizona to Montreal, Canada, where it was received and accepted.

2. Complainant sent an invoice to respondent with respect to this transaction. Respondent took no action with respect to the invoice until January 21, 1986, when it notified complainant through its attorney that it had not ordered the goods, and was not involved in the transaction.

3. Complainant never talked directly with respondent prior to or immediately after December 3, 1985. El Dorado Packing Company did not deal with respondent with respect to this transaction.

Discussion

This proceeding is one of numerous proceedings in which respondent, Pamco Airfresh, Inc., has been named as a respondent by sellers of produce for transactions which occurred between October, 1985, and December, 1986. The evidence in this case reflects clearly that complainant thought it was dealing with respondent with respect to the sale of lettuce. It dealt through a broker known as El Dorado Packing. There is no statement in the record by El Dorado Packing to show how it dealt with respondent. Indeed, there is serious question as to whether El Dorado Packing ever talked with respondent before or after the transaction was entered into. It is clear that complainant sent its invoice to respondent. It is also clear that respondent set the invoice aside, and took no action with respect to it until more than a month after it received the invoice. Respondent denied ordering the produce. There is no indication in this record that it did so.

As the proponent of the terms of the contract complainant had the burden to prove the terms thereof. *New York v. Sandler*, 32 Agric. Dec. 702 (1973). An invoice is evidence of the existence of a contract. However, it does not prove in and of itself that a contract existed. See *Casey Woodwyk v. Albanese*

Farms, 31 Agric. Dec. 311 (1972). Complainant has alleged that it sold the lettuce to respondent. Respondent has denied that it was involved in the transaction. The evidence does not show that respondent did anything other than receive an invoice. The goods went from Arizona to Canada. There is no statement from the broker that it ever dealt with respondent. There is a statement by complainant's representative Thomas R. Oliveri, of Western Growers Association, in which Mr. Oliveri says that he was contacted by complainant regarding the failure of respondent to pay for the produce involved, and in which other alleged facts are set forth. Mr. Oliveri had no direct knowledge of the transaction. Rather, he is serving more as a legal counsel for complainant. Pursuant to 7 C.F.R. § 47.20(h):

> Verification shall be made under oath of any facts set forth in the pleading or statement, by the person who signs the pleading or statement. The form of verification may be substantially as follows: *(name of affiant), being first duly sworn, says that he had read the foregoing document and knows the contents thereof and that the facts set forth therein are true, except as to matters therein stated on information and belief, and as to such matters he believes them to be true, . . .*

While Mr. Oliveri made such a verification we cannot accept Mr. Oliveri's statement as indicative of the fact that he has any direct knowledge of the facts stated therein because his statement is unsupported hearsay. *Royal Valley Fruit Growers Ass'n v. Hamady Brothers Food Markets*, 37 Agric. Dec. 1925 (1978). Statements of this nature are not acceptable as evidence in shortened procedure cases because they are, in effect, merely argument. Therefore, for this case and any other case in which they are received cannot be given evidentiary value.

Based upon the evidence in this case we find no basis on which to conclude that respondent had any contact with complainant, either directly or through El Dorado. The law is clear insofar as its liability is concerned.

Complainant did not prove that there was a contract between it and Pamco. Therefore, Pamco cannot be held liable on the basis that it was a party to the contract. Neither can we find on this record any evidence that Pamco was an agent for some other business entity. Thus, with respect to a simple agency theory, Pamco must prevail. *Central & South American Imports Co. v. West Indies Food & Importing, Inc.*, 34 Agric. Dec. 1015, 1020 (1975).

There is no evidence that Pamco had granted authority to some other seller of produce to tell sellers that Pamco would pay the invoices. If such had been the case, Pamco would be estopped to deny that it would accept the invoices and pay them. However, we cannot reach such a conclusion. The necessary elements for the doctrine of estoppel to apply are not all present. Those elements are that the principal has given indicia of authority to the

agent or has knowingly permitted or caused another to appear to be its agent, there must be a representation of the agency by the principal, there must be reliance upon such representation by a third party, and such representation must have been acted on in good faith to the injury of that third party. *Sunny Sally, Inc. v. Ray Burke Farms*, 23 Agric. Dec. 268 (1964). We cannot find that Pamco ever represented to anybody that anyone had authority to act as its agent, and have invoices sent to Pamco for payment.

There is no proof on this record that Pamco had any involvement in the transaction. Complainant's only remaining hope for recovery is on the theory that Pamco should have returned the invoice immediately rather than seven weeks later, and that its failure to do so somehow rendered it liable. Complainant did not cite any precedents which would support this theory. Nor could we find any. Indeed, such a theory is illogical. If this theory were upheld, any unscrupulous person or business would be able to send an invoice to any other person or business, and merely await the unfortunate recipient's failure to respond at an early time before it enriched itself at the recipient's expense.

In view of the above, the complaint in this proceeding must be dismissed. So also must the cross claim on the part of respondent in view of the fact that it was dependent upon the outcome of complainant's action against it.

Order

The complaint in this proceeding is dismissed. The cross complaint in this proceeding is dismissed.

Copies of this order shall be served upon the parties.

ROBERT L. MEYER d/b/a MEYER TOMATOES v. SANTOS PRODUCE CO., INC.
PACA Docket No. R 88-180.
Order of Dismissal filed August 3, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

Complainant notified the Department that it had filed suit against respondent in civil court and that the parties had entered into a stipulation of judgment. Since complainant has elected to proceed in court, its reparation complaint must be dismissed, pursuant to 7 U.S.C. 499e(b).

Accordingly, the complaint was dismissed.

MICHAEL W. MORGAN & JOHN C. VEYSEY, d/b/a RANCHO DOS PALMAS v. BOISE FARMERS MARKET, INC.
PACA Docket No. 2-7255.
Decision and Order filed August 8, 1988.

Dennis Becker, Presiding Officer
Thomas R Olivert, Newport Beach, California, for Complainant.
Respondent, pro se.
Decision and Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay to complainant $9,059.20, with interest thereon at the rate of 13 percent per annum from March 1, 1986, until paid.

Copies of this order shall be served upon the parties.

MIDWEST MARKETING COMPANY v. SANFILLIPO BROS., INC.
PACA Docket No. 2-7562.
Decision and Order filed August 29, 1988.

Roberta Swartzendruber, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within thirty (30) days from the date of this order, respondent shall pay to complainant $3,648.78 as reparation. Interest at the rate of 13 percent per annum will be assessed on the $3,648.78 from July 1, 1986, until paid.

Copies of this order shall be served upon the parties.

JAY NICHOLS, INC. v. CAPITOL PRODUCE, INC.
PACA Docket No. 2-7144.
Decision and Order filed August 23, 1988.

Edward M. Silverstein, Presiding Officer
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint is dismissed.

Copies of this order shall be served upon the parties.

NIKADEMOS DISTRIBUTING COMPANY, INC. v. BOLIVAR GAMEZ d/b/a ROBIL INTERNATIONAL.
PACA Docket No. 2-7295.
Decision and Order filed August 23, 1988.

George S. Whitten, Presiding Officer
Complainant, pro se
Respondent, pro se
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $1,923.05, with interest thereon at the rate of 13 percent per annum from May 1, 1985, until paid.

Copies of this order shall be served upon the parties.

NORTHCROSS DISTRIBUTING v. EAST COAST BROKERS & PACKERS, INC.
PACA Docket No. 2-7335.
Decision and Order filed August 29, 1988.

George S Whitten, Presiding Officer.
E. Leigh Larson, Nogales, Arizona, for Complainant.
Jeffrey A Knishkowy, Washington, D.C, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $9,000.00, with interest thereon at the rate of 13 percent per annum from April 1, 1986, until paid.

Copies of this order shall be served upon the parties.

P-R FARMS SALES & EXPORT, INC. v. TOM LANGE COMPANY, INC.
PACA Docket No. 2-7420.
Decision and Order filed August 29, 1988.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, California, for Complainant.
Respondent, pro se.
Decision and Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant $10,008.20, with interest thereon at the rate of 13 percent per annum from July 1, 1986, until paid.

Copies of this order shall be served upon the parties.

GRADY PRUETTE, d/b/a C&G PACKERS v. MELBURN R. TROVER, d/b/a TROVER PRODUCE.
PACA Docket No. R 88-184.
Reparation Order filed August 3, 1988.

Reparation Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $10,400.00, with interest thereon at the rate of 13 percent per annum from July 1, 1987, until paid.

Copies of this order shall be served upon the parties.

JAMES C. RETRUM and LINDA C. RETRUM d/b/a J & L PRODUCE v. DAL-DON PRODUCE CO. INC.
PACA Docket No. 2-7309.
Decision and Order filed August 23, 1988.

Edward M. Silverstein, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay complainant, as reparation, $187.29, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

SAN MIGUEL PRODUCE, INC. v. SUNSPROUTS OF TEXAS, INC. and/or C.H.R. COMPANY.
PACA Docket No. 2-7250.
Decision and Order filed August 29, 1988.

Sharlene W. Lassiter, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent Sunsprouts of Texas, Inc., shall pay to Miguel Produce, Inc., $4,306.35, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

GILBERTO R. SANTOS d/b/a S & S PRODUCE v. VAN De WALLE FARMS, INC.
PACA Docket No. 2-7366.
Decision and Order filed August 9, 1988.

George S. Whitten, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $2,517.75, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

SUNRISE PRODUCE, INC. v. THE CASTELLINI COMPANY.
PACA Docket No. 2-7024.
Stay Order filed August 3, 1988.

Stay Order issued by Donald A Campbell, Judicial Officer

STAY ORDER AND EXTENSION OF TIME FOR FILING PETITION TO REHEAR, REARGUE, AND RECONSIDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), an order was issued on June 13, 1988. By letter received in the Office of the Hearing Clerk on July 7, 1988, respondent has moved that the reparation order be stayed, and that respondent be granted an extension of time within which to submit a petition to rehear, reargue and reconsider.

Accordingly, the order of June 13, 1988 is hereby stayed. Section 47.24(a) of the Rules of Practice under the Act (7 C.F.R. § 47.24(a)) provides that a petition for rehearing or reargument of the proceeding, or for reconsideration of the order, shall be filed within ten days after the date or receipt of the order. While respondent did not file a petition to rehear, reargue, and reconsider within ten days after service of the order, on the basis of its requests for a stay of the reparation order and extension of time, respondent is hereby granted until August 15, 1988, to file a petition for rehearing or reargument of the proceeding, or for reconsideration of the reparation order of June 13, 1988. That petition shall state specifically the matters claimed to have been erroneously decided and the alleged errors. The petition has no evidentiary value and therefore does not need to be verified.

Copies of this order shall be served upon the parties.

TAVILLA SALES COMPANY v. VAL-MEX FRUIT CO., INC.
PACA Docket No. 2-7254.
Decision and Order filed August 9, 1988.

Jennis Becker, Presiding Officer.
Complainant, pro se
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to mplainant $3,525.22, with interest thereon at the rate of 13 percent per num from July 1, 1984, until paid.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT ORDERS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

(Summarized)

ATB DISTRIBUTING CO. v. DAN E. FRIESEN & CO. INC.
PACA Docket No. RD 88-372.
Default Order issued August 17, 1988.

Respondent was ordered to pay complainant, as reparation, $4,956.02, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

AMERICAN BANANA CO. INC. v. FOODWAYS INC.
PACA Docket No. RD 88-378.
Default Order issued August 24, 1988.

Respondent was ordered to pay complainant, as reparation, $53,165.45, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

GUS ANGELAKIS and JOYCE ANGELAKIS d/b/a FRANCISCO DISTRIBUTING COMPANY v. SMITHPRO BROKERAGE INC.
PACA Docket No. RD 88-414.
Default Order issued August 31, 1988.

Respondent was ordered to pay complainant, as reparation, $42,874.08, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

HENRY ANKENY CO. v. GARY WATKINS PRODUCE CO. INC.
PACA Docket No. RD 88-345.
Default Order issued August 10, 1988.

Respondent was ordered to pay complainant, as reparation, $20,463.75, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

ARKANSAS VALLEY PRODUCE OF TEXAS INC. v. ORIENT PRODUCE & FOOD CO.
PACA Docket No. RD 88-386.
Default Order issued August 25, 1988.

Respondent was ordered to pay complainant, as reparation, $5,257.00, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

ASSOCIATED POTATO GROWERS INC. v. TOXEY G. LANDRUM JR. d/b/a TOXEY GERALD LANDRUM JR.
PACA Docket No. RD 88-354.
Default Order issued August 11, 1988.

Respondent was ordered to pay complainant, as reparation, $4,815.00, plus 13 percent interest per annum thereon from May 1, 1987, until paid.

ROBERT L. BERARD d/b/a SPUDLAND MARKETING v. PRODUCE COUNTRY.
PACA Docket No. RD 88-341.
Default Order issued August 4, 1988.

Respondent was ordered to pay complainant, as reparation, $6,499.50, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

BIG "H" SALES, INC. v. SPADA DISTRIBUTING CO., INC.
PACA Docket No. RD 88-262.
rder issued August 4, 1988.

ORDER DENYING MOTION TO REOPEN AFTER DEFAULT, VACATING STAY ORDER, REINSTATING DEFAULT ORDER
(Summarized)

Respondent filed a motion to reopen the proceeding after default and ow the filing of an answer.

Respondent claimed that complainant had authorized it to notify the partment that complainant wanted the proceeding stayed or dismissed ause an "arrangement" had been made between the parties. Complainant ied these claims. Based on complainant's position, there are no grounds

for reopening the default or dismissing the complaint. Therefore, respondent's motion to reopen is denied.

The Stay Order was vacated and the Default Order was reinstated with the amount awarded therein to be paid within 30 days from the date of this order.

BLOCH & LODER INC. a/t/a PACIFIC PRODUCE COMPANY WAIALUA PRODUCTS LTD.
PACA Docket No. RD 88-368.
Default Order issued August 15, 1988.

Respondent was ordered to pay complainant, as reparation, $17,717.60, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

BLUE ANCHOR INC. v. BARRIE KELLNER, KARL KELLNER & MEL WINICK d/b/a ATLANTIC PRODUCE and/or ATLANTIC PRODUCE INC. a/t/a ATLANTIC PRODUCE.
PACA Docket No. RD 88-375.
Default Order issued August 17, 1988.

Respondent was ordered to pay complainant, as reparation, $1,558.20, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

GODFREY BORGARDT & SONS INC. v. J.W. NASH PRODUCE CO. INC.
PACA Docket No. RD 88-390.
Default Order issued August 25, 1988.

Respondent was ordered to pay complainant, as reparation, $8,630.00, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

CHAPMAN FRUIT CO. INC. v. VIC MAHNS INC.
PACA Docket No. RD 88-374.
Default Order issued August 17, 1988.

Respondent was ordered to pay complainant, as reparation, $8,495.00, plus 13 percent interest per annum thereon from June 1, 1987, until paid.

CHAPMAN FRUIT CO. INC. v. S.W. FLORIDA SALES CORP.
PACA Docket No. RD 88-393.
Default Order issued August 19, 1988.

Respondent was ordered to pay complainant, as reparation, $54,339.75, plus 13 percent interest per annum thereon from May 1, 1987, until paid.

COLORADO POTATO GROWERS EXCHANGE v. GARY WATKINS PRODUCE CO. INC.
PACA Docket No. RD 88-391.
Default Order issued August 19, 1988.

Respondent was ordered to pay complainant, as reparation, $1,600.00, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

CRAVERO BROS. PRODUCE CO. v. SUNCOAST FOODS INC.
PACA Docket No. RD 88-381.
Default Order issued August 18, 1988.

Respondent was ordered to pay complainant, as reparation, $15,493.83, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

THOMAS DAME.
PACA Docket No. RD 88-369.
Default Order issued August 15, 1988.

Respondent was ordered to pay complainant, as reparation, $8,243.37, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

De BRUYN PRODUCE CO. v. WAYCO CORP. a/t/a AMERITEX PRODUCE.
PACA Docket No. RD 88-343.
Default Order issued August 10, 1988.

Respondent was ordered to pay complainant, as reparation, $3,925.00, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

NICK DELIS CO. INC. v. WESTATES COMMODITIES INC.
PACA Docket No. RD 88-340.
Default Order issued August 4, 1988.

Respondent was ordered to pay complainant, as reparation, $36,456.00, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

ELL-PINE PACKING CO. v. ROBERT G. GREIDER d/b/a GREIDERS OLD FASHION POTATO CHIPS.
PACA Docket No. RD 88-366.
Default Order issued August 15, 1988.

Respondent was ordered to pay complainant, as reparation, $1,215.00, plus 13 percent interest per annum thereon from April 1, 1987, until paid.

FINEST FRUIT INC. v. WILLIAM J. HANLON d/b/a HOL-LEE FARMS.
PACA Docket No. RD 88-364.
Default Order issued August 15, 1988.

Respondent was ordered to pay complainant, as reparation, $2,066.00, plus 13 percent interest per annum thereon from May 1, 1987, until paid.

SCOTT FINKS CO. INC. v. TOXEY G. LANDRUM JR. d/b/a TOXEY GERALD LANDRUM JR.
PACA Docket No. RD 88-355.
Default Order issued August 11, 1988.

Respondent was ordered to pay complainant, as reparation, $1,162.50, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

ANGELO M. FORMOSA FOODS INC. v. RESTAURANT SERVICES INC.
PACA Docket No. RD 88-385.
Default Order issued August 24, 1988.

Respondent was ordered to pay complainant, as reparation, $5,495.00, plus 13 percent interest per annum thereon from January 1, 1988, until paid.

FRUITS OF FOUR SEASONS INC. v. GLENMERE FARMS INC.
PACA Docket No. RD 88-353.
Default Order issued August 11, 1988.

Respondent was ordered to pay complainant, as reparation, $5,579.25, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

GILL CORN FARMS INC. v. L.R. MORRIS PRODUCE EXCHANGE INC.
PACA Docket No. RD 88-394.
Default Order issued August 19, 1988.

Respondent was ordered to pay complainant, as reparation, $21,068.00, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

GRIFFIN & BRAND SALES AGENCY INC. v. SMITH PRODUCE INC.
PACA Docket No. RD 88-413.
Default Order issued August 31, 1988.

Respondent was ordered to pay complainant, as reparation, $1,300.00, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

STAN HARTMANN SALES CO. INC. v. GUSTIN PRODUCE INC.
PACA Docket No. RD 88-350.
Default Order issued August 11, 1988.

Respondent was ordered to pay complainant, as reparation, $4,147.00, plus 13 percent interest per annum thereon from June 1, 1987, until paid.

L.G. HERNDON JR. d/b/a L.G. HERNDON JR. FARMS v. LARRY H. PLOTT d/b/a FARM FRESH MARKET.
PACA Docket No. RD 88-379.
Default Order issued August 18, 1988.

Respondent was ordered to pay complainant, as reparation, $13,757.50, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

H.R. HINDLE & CO., INC. v. CALIFORNIA CUSTOM CUTS, INC.
PACA Docket No. RD 88-200.
Ruling issued on August 30, 1988.

RULING ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), an Order Denying Motion to Reopen After Default was issued on May 13, 1988. Respondent moved for reconsideration and, on June 14, 1988, a stay order was issued.

In its motion, respondent states that on January 25, 1988, its president contacted a Department official and related respondent's defense to the complaint, received that day. Respondent's president allegedly discussed his upcoming absence from respondent's office "and was under the impression my time for filing had been extended." Respondent has not submitted any documents reflecting the purported extension of time, nor has it specified the date to which the filing deadline was allegedly extended. It is thus our conclusion that respondent was not granted an extension of time to file its answer.

Therefore, respondent's request for reconsideration is denied, the June 14, 1988, stay order is vacated, and the May 13, 1988, Order Denying Motion to Reopen After Default is reinstated.

Copies of this order shall be served upon the parties.

THE HORTON FRUIT CO. INC. v. DANIEL R. BOLIN d/b/a BOLIN'S PRODUCE.
PACA Docket No. RD 88-363.
Default Order issued August 12, 1988.

Respondent was ordered to pay complainant, as reparation, $6,082.40, plus 13 percent interest per annum thereon from June 1, 1987, until paid.

KENNY'S PRODUCE INC. v. JOHN ORTEGA d/b/a EL RANCHO PRODUCE.
PACA Docket No. RD 88-384.
Default Order issued August 24, 1988.

Respondent was ordered to pay complainant, as reparation, $11,049.26, plus 13 percent interest per annum thereon from January 1, 1988, until paid.

L & J MARKETING CO. v. JOHN M. GIUSTINO d/b/a GRAND SLAM PRODUCE.
PACA Docket No. RD 88-339.
Default Order issued August 4, 1988.

Respondent was ordered to pay complainant, as reparation, $1,302.00, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

L J C PRODUCE CO. INC. v. KOREAN PRODUCE CORPORATION.
PACA Docket No. RD 88-352.
Default Order issued August 11, 1988.

Respondent was ordered to pay complainant, as reparation, $1,170.00, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

LAKE WALES CITRUS GROWER'S ASSOCIATION v. PRODUCE COUNTRY.
PACA Docket No. RD 88-373.
Default Order issued August 17, 1988.

Respondent was ordered to pay complainant, as reparation, $2,087.10, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

DONALD J. LALONDE and ARTHUR F. LALONDE JR. d/b/a CONTINENTAL SALES v. RESTAURANT SERVICES INC.
PACA Docket No. RD 88-347.
Default Order issued August 10, 1988.

Respondent was ordered to pay complainant, as reparation, $5,383.40, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

LANGDON BARBER GROVES INC. a/t/a M W FRUIT CO. v. MARIANINO'S INC. a/t/a NINO'S FARMER'S MARKET.
PACA Docket No. RD 88-383.
Default Order issued August 24, 1988.

Respondent was ordered to pay complainant, as reparation, $10,811.00, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

M.J. FARMS INC. v. GREAT PLAINS BROKERAGE INC.
PACA Docket No. RD 88-365.
Default Order issued August 15, 1988.

Respondent was ordered to pay complainant, as reparation, $12,048.25, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

MANN PACKING COMPANY INC. v. BOZZELLI FARMS INC.
PACA Docket No. RD 88-388.
Default Order issued August 25, 1988.

Respondent was ordered to pay complainant, as reparation, $13,677.00, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

DANIEL J. MATTHEWS d/b/a J.C. MATTHEWS CO. v. HUB CORPORATION a/t/a PICKLE KING.
PACA Docket No. RD 88-360.
Default Order issued August 12, 1988.

Respondent was ordered to pay complainant, as reparation, $3,332.75, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

MAUNA KEA AGRONOMICS INC. v. JOSEPH CIMINIO COMPANY INC
PACA Docket No. RD 88-337.
Default Order issued August 4, 1988.

Respondent was ordered to pay complainant, as reparation, $1,800.00, plus 13 percent interest per annum thereon from October 1, 1986, until paid.

DONALD H. MOLTER d/b/a ED'S PRODUCE v. PALM CITY PRODUCE INC.
PACA Docket No. RD 88-356.
Default Order issued August 12, 1988.

Respondent was ordered to pay complainant, as reparation, $3,729.00, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

MUIR-ROBERTS COMPANY INC. v. SMITH PRODUCE INC.
PACA Docket No. RD 88-380.
Default Order issued August 18, 1988.

Respondent was ordered to pay complainant, as reparation, $1,350.00, plus 13 percent interest per annum thereon from January 1, 1988, until paid.

MURAKAMI FARMS INC. a/t/a MURAKAMI PRODUCE CO. v. MATRANA'S PRODUCE INC.
PACA Docket No. RD 88-269.
Default Order issued August 4, 1988.

Respondent was ordered to pay complainant, as reparation, $1,081.25, plus 13 percent interest per annum thereon from April 1, 1987, until paid.

MURAKAMI FARMS INC. a/t/a MURAKAMI PRODUCE CO. v. MATRANA'S PRODUCE INC.
PACA Docket No. RD 88-269.
Order issued August 4, 1988.

ORDER REOPENING AFTER DEFAULT
(Summarized)

The respondent filed a motion to reopen this proceeding after default and allow the filing of an answer.

It was concluded that the motion to reopen was filed within a reasonable time and that good reason was shown why the relief requested in the motion should be granted. Accordingly, respondent's default in the filing of an answer was set aside.

Respondent has ten days from receipt of this order to file an answer. If a timely answer is not filed, the default order will be reinstated.

[New docket number is R 88-231.--Editor]

NEW WEST FRUIT CORPORATION v. GUSTIN PRODUCE INC.
PACA Docket No. RD 88-349.
Default Order issued August 11, 1988.

Respondent was ordered to pay complainant, as reparation, $580.60, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

NORTH SIDE BANANA COMPANY v. EDNA E. THOMPSON d/b/a FORT BEND COUNTY FARMERS MARKET.
PACA Docket No. RD 88-359.
Default Order issued August 12, 1988.

Respondent was ordered to pay complainant, as reparation, $11,579.43, plus 13 percent interest per annum thereon from August 1, 1986, until paid.

NORTHAMPTON GROWERS PRODUCE SALES INC. v. ADVANCED SHIPPING AND TRADING a/t/a FAIR SEAS TRADING.
PACA Docket No. RD 88-338.
Default Order issued August 4, 1988.

Respondent was ordered to pay complainant, as reparation, $2,290.00, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

NORTHERN PRODUCE/MUSHROOMS INC. v. BOZZELLI FARMS INC.
PACA Docket No. RD 88-387.
Default Order issued August 25, 1988.

Respondent was ordered to pay complainant, as reparation, $98,569.35, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

J.R. NORTON COMPANY v. LOI BRONX TERMINAL CORP.
PACA Docket No. RD 88-357.
Default Order issued August 12, 1988.

Respondent was ordered to pay complainant, as reparation, $587.50, plus 13 percent interest per annum thereon from December 1, 1986, until paid.

PACIFIC FARM COMPANY v. KOREAN PRODUCE CORPORATION.
PACA Docket No. RD 88-351.
Default Order issued August 11, 1988.

Respondent was ordered to pay complainant, as reparation, $1,965.00, plus 13 percent interest per annum thereon from November 1, 1986, until paid.

PACIFIC FRESH MARKETING INC. v. DOTTIE CHARBONEAU AND CHARLES R. SULLWOLD d/b/a C & S PRODUCE.
PACA Docket No. RD 88-346.
Default Order issued August 10, 1988.

Respondent was ordered to pay complainant, as reparation, $3,834.00, plus 13 percent interest per annum thereon from June 1, 1987, until paid.

PARK RIVER POTATO CO. INC. v. JOE B. ALLEY d/b/a A-1 PRODUCE COMPANY OF JACKSON MISS.
PACA Docket No. RD 88-342.
Default Order issued August 10, 1988.

Respondent was ordered to pay complainant, as reparation, $2,235.50, plus 13 percent interest per annum thereon from February 1, 1986, until paid.

PATTILLO BROS. PRODUCE CO. INC. v. J.W. NASH PRODUCE CO. INC.
PACA Docket No. RD 88-411.
Default Order issued August 31, 1988.

Respondent was ordered to pay complainant, as reparation, $2,324.00, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

PHELAN & TAYLOR PRODUCE COMPANY v. SMITHPRO BROKERAGE INC.
PACA Docket No. RD 88-415.
Default Order issued August 31, 1988.

Respondent was ordered to pay complainant, as reparation, $3,606.00, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

PRESTIGE PRODUCE & FARMS INC. v. VIC MAHNS INC.
PACA Docket No. RD 88-395.
Default Order issued August 19, 1988.

Respondent was ordered to pay complainant, as reparation, $1,661.00, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

RITCLO PRODUCE INC. v. BOZZELLI FARMS INC.
PACA Docket No. RD 88-389.
Default Order issued August 25, 1988.

Respondent was ordered to pay complainant, as reparation, $21,283.40, plus 13 percent interest per annum thereon from February 1, 1987, until paid.

RIVER CITY PRODUCE CO. INC. v. ALICE KIKER d/b/a A-1 PRODUCE.
PACA Docket No. RD 88-376.
Default Order issued August 18, 1988.

Respondent was ordered to pay complainant, as reparation, $23,511.42, plus 13 percent interest per annum thereon from May 1, 1987, until paid.

C.H. ROBINSON COMPANY v. THE TOLEDO GARDENERS COOPERATIVE ASSOCIATION.
PACA Docket No. RD 88-344.
Default Order issued August 10, 1988.

Respondent was ordered to pay complainant, as reparation, $960.00, plus 13 percent interest per annum thereon from November 1, 1987, until paid

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C.H. ROBINSON COMPANY v. GARY WATKINS PRODUCE CO. INC.
PACA Docket No. RD 88-371.
Default Order issued August 17, 1988.

Respondent was ordered to pay complainant, as reparation, $82,051.20, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

ROCKY PRODUCE INC. v. PETER J. TOCCO d/b/a PREMIER PRODUCE CO.
PACA Docket No. RD 88-377.
Default Order issued August 18, 1988.

Respondent was ordered to pay complainant, as reparation, $17,804.37, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

JOHN ROTHSTEIN CO. INC. v. JESUS M. PEREZ d/b/a 666 PRODUCE.
PACA Docket No. RD 88-367.
Default Order issued August 15, 1988.

Respondent was ordered to pay complainant, as reparation, $3,771.00, plus 13 percent interest per annum thereon from November 1, 1986, until paid.

RICHARD M. RUIZ d/b/a RUIZ PRODUCE CO. v. J.W. NASH PRODUCE CO. INC.
PACA Docket No. RD 88-410.
Default Order issued August 31, 1988.

Respondent was ordered to pay complainant, as reparation, $1,848.00, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

S & S PRODUCE CO. v. DOTTIE CHARBONEAU and CHARLES R. SULLWOLD d/b/a C & S PRODUCE.
PACA Docket No. RD 88-392.
Default Order issued August 19, 1988.

Respondent was ordered to pay complainant, as reparation, $9,192.00, plus 13 percent interest per annum thereon from April 1, 1987, until paid.

SOUTHWEST PRODUCE CO. INC. v. D & L GROCERY INC. a/t/a RONNIES FOOD CENTER.
PACA Docket No. RD 88-382.
Default Order issued August 24, 1988.

Respondent was ordered to pay complainant, as reparation, $4,771.75, plus 13 percent interest per annum thereon from May 1, 1987, until paid.

TRIPLE E PRODUCE CORP. v. INDEPENDENCE PRODUCE COMPANY INC.
PACA Docket No. RD 88-362.
Default Order issued August 12, 1988.

Respondent was ordered to pay complainant, as reparation, $5,634.50, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

UCON PRODUCE INC. v. SMITH PRODUCE INC.
PACA Docket No. RD 88-412.
Default Order issued August 31, 1988.

Respondent was ordered to pay complainant, as reparation, $7,961.25, plus 13 percent interest per annum thereon from March 1, 1988, until paid.

VAL-MEX FRUIT COMPANY INC. v. ERNEST CAVAZOS d/b/a ERNEST PRODUCE.
PACA Docket No. RD 88-361.
Default Order issued August 12, 1988.

Respondent was ordered to pay complainant, as reparation, $47,805.80, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

VENIDA PACKING INC. v. SELECT PRODUCE INC.
PACA Docket No. RD 88-348.
Default Order issued August 10, 1988.

Respondent was ordered to pay complainant, as reparation, $3,285.00, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

WINTER GARDEN GROWERS INC. v. J.W. NASH PRODUCE CO. INC.
PACA Docket No. RD 88-282.
Default Order issued August 12, 1988.

Respondent was ordered to pay complainant, as reparation, $887.00, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

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n re: BUZZ SHAHAN, d/b/a SHAHAN FARMS.
'RPA Docket No. D-4.
)rder filed August 10, 1988.

)hn D. Griffith, for Complainant.
espondent, pro se.
rder issued by Victor W. Palmer, Chief Administrative Law Judge.

ORDER

Complainant has moved to dismiss this case. In support of complainant's iotion, complainant has stated that it has been unable to determine espondent's current whereabouts.

WHEREFORE, FOR GOOD CAUSE SHOWN, it is hereby ordered that iis complaint is dismissed without prejudice.

CONSENT DECISIONS ISSUED
AUGUST 1988

(Not Published Herein --Editor)

Animal Quarantine and Related Laws

DANNY HUGO. AQ Docket No. 88-11. August 2, 1988.

W.G. MERCER, DONALD FORESTER, ATHENS COMMISSION COMPANY, INC. and FORESTER BROTHERS. AQ Docket No. 102.
Consent Decision for W.G. Mercer. August 29, 1988.

SUPERIOR CATTLE SALES, INC., d/b/a SANTA SERVICES. AQ Docket No. 329. August 12, 1988.

DR. MICHAEL L. TRIPP. VA Docket No. 88-1. August 26, 1988.

Animal Welfare Act

VIVIAN LEE BOX. AWA Docket No. 88-4. August 12, 1988.

Horse Protection Act

MARTHA CAMPBELL and WILLIAM E. BARROW. HPA Docket No. 88-36.
Consent Decision as to Martha Campbell. August 10, 1988.
Consent Decision as to William E. Barrow. August 10, 1988.

LARRY E. EDWARDS and GARY R. EDWARDS, d/b/a CARL EDWARDS and SONS STABLES, and VINCENT SAIA. HPA Docket No. 88-2.
Consent Decision as to Vincent Saia. August 19, 1988.

Packers and Stockyards Act

ERICSON LIVESTOCK MARKET, INC., JAMES D. BRINKMAN, HOWARD W. PITZER, JANE A. BRINKMAN, RONALD E. WILSON d/b/a RONALD WILSON CATTLE COMPANY, D/B LAND and CATTLE COMPANY, INC., WILLIAM "DEAN" BRINKMAN, KATHERINE BRINKMAN, MARLEN LUBER, and JAMES "JIM" S. PATTERSON. P&S Docket No. D 88-28.
Consent Decision with Respect to Respondents Ericson Livestock Market, Inc., James D. Brinkman, Howard Pitzer and Jane A. Brinkman. August 10, 1988.

Packers and Stockyards Act (Cont.)

RANDY CARDEN, INC., RANDY CARDEN, THOMAS HOWELL OGLETREE, MARK STRICKLAND, TERREL STRICKLAND, and RONALD WARD. P&S Docket No. D 88-67.

Consent Decision with Respect to Thomas Howell Ogletree. August 12, 1988.

Consent Decision with Respect to Randy Carden, Inc., and Randy Carden. August 12, 1988.

CARDINGTON LOCKER, INC., d/b/a CARDINGTON PACKING COMPANY, and GALE V. SLACKS. P&S Docket No. D 88-15. August 2, 1988.

FRANKLIN VEAL CO., INC., A CORPORATION, and CHRISTOPHER MARAFIOTE, AN INDIVIDUAL. P&S Docket No. D 88-53. August 12, 1988.

JAMES BROCK HENDERSEN d/b/a B&H LIVESTOCK. P&S Docket No. D 88-66. August 17, 1988.

C. LeROY NOLL. P&S Docket No. 6711. February 29, 1988.
[This consent Decision and Order was omitted from the February 1988, issue.--Editor.]

OLD CINCINNATI MEATS, INC., VICTORIA K. SUMMERLY, and JACK KOCH. P&S Docket No. D 88-63. August 9, 1988.

PINE VALLEY MEATS, INC., and RONALD L. PLUEGER. P&S Docke No. D 88-40. August 3, 1988.

REGGIE PACKING CO., and REGINALD G. ASH. P&S Docket No. D 88-79. August 18, 1988.

RICHARD A. STAGNO. P&S Docket No. D 88-3. August 5, 1988.

RICHARD J. TAYLER. P&S Docket No. D 88-58. August 9, 1988.

Perishable Agricultural Commodities Act

MOORE MARKETING INTERNATIONAL, INC. PACA Docket No. 2-7088. August 1, 1988.

Plant Quarantine Act

PAN AMERICAN BULB COMPANY, INC. PQ Docket No. 88-7. August 3, 1988.